Goya Foods of Florida *and* UNITE HERE, CLC.[1]

Cases 12–CA–19668, 12–CA–19765, 12–CA–19779–1, 12–CA–19945, 12–CA–19962, 12–CA–20041, 12–CA–20099–1, 12–CA–20127, 12–CA–20233–1, 12–CA–20233–2, 12–CA–20256, 12–CA–20426, 12–CA–20496, 12–CA–20542, and 12–CA–20570

August 30, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 22, 2001, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and reply briefs; the General Counsel filed an answering brief; and the Charging Party filed cross exceptions, a supporting brief, an answering brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings,[3] findings,[4] and conclusions as modified and to adopt the recommended Order as modified and as set forth in full below.[5]

A. Background

As set forth more fully by the judge, this proceeding involves alleged unfair labor practices occurring during 1998 and 1999. The Respondent is a large wholesaler of Hispanic food products at its facility in Miami, Florida. The Union was certified as the collective-bargaining representative of a unit of warehouse employees and drivers (warehouse unit) on October 26, 1998, and a unit of sales and merchandising employees (sales unit) on December 4, 1998. The complaint alleged that the Respondent committed numerous violations of Section 8(a)(1), (3), and (5). The violations allegedly took place during the course of the Union's organizing campaign and during the parties' subsequent negotiations for a first contract.

[1] We have amended the caption to reflect the merger of the Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE!) with the Hotel Employees and Restaurant Employees International Union, AFL–CIO, CLC (HERE), effective July 8, 2004, and the disaffiliation of UNITE HERE from the AFL–CIO effective September 14, 2005.

[2] The Respondent failed to except with the specificity required under NLRB Rules and Regulations Sec. 102.46(b)(1) to certain of the judge's findings of 8(a)(1) violations regarding threats of plant closure, threats of discharge, solicitation of grievances and the promise to remedy them, futility threats, and interrogation. Rather, the Respondent excepts generally to the judge's conclusions of law that reference "interrogating, soliciting grievances, and threatening employees," with no supporting arguments. In the absence of appropriate exceptions, we affirm the judge's findings and conclusions concerning those violations of Sec. 8(a)(1). See, e.g., *Valentine Painting & Wallcovering, Inc.*, 331 NLRB 883 fn. 2 (2000), enfd. 8 Fed. Appx. 116 (2d Cir. 2001).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions in this regard are without merit.

[4] The judge found that the Respondent violated Sec. 8(a)(1) by its July 9, 1999 letter to its salesmen indicating that employee Reinaldo Bravo's purported tampering with the Respondent's barbeque-"mojo" sauce in a Winn-Dixie store had placed the employees' jobs in jeopardy and by Goya Foods of Puerto Rico President and major shareholder Frank Unanue's statement to salesmen in early November 1999 that, if Goya employees continued with the union rallies and activities at Winn-Dixie supermarkets, the Respondent could lose the account and "employees could suffer because they would lose their jobs." The Respondent argues that the letter and statement merely reflected the Respondent's opinion and, regardless, were true at the time they were made. We find it unnecessary to pass on whether the letter and statement violated Sec. 8(a)(1) as they are cumulative of other similar violations found and therefore do not affect the Order or notice. Accordingly, the Charging Party's exception that Frank Unanue's statement, found to have been made in November, actually occurred in September, is moot.

The Charging Party also excepts to the judge's failure to find an 8(a)(1) violation based on Frank Unanue's alleged statement in September 1999 that if employees kept "fooling around by protesting at Winn-Dixie Supermarkets . . . Winn-Dixie was going to remove Goya salesmen from their stores and Goya was going to have to terminate a lot of salespeople . . . and not specifically, just the salesmen who service the Winn-Dixie Stores." We likewise find any such violation to be cumulative.

The Charging Party further contends that the judge erred in failing to find a violation of Sec. 8(a)(1) based on Frank Unanue's alleged statement to salesmen that "we have to make sure to give the best quality of service to Winn-Dixie because they were not sure whether they were going to continue distributing their product or not." The General Counsel neither alleged in the complaint that this statement violated the Act nor excepted to the judge's failure to find the violation. Accordingly, we find no merit in the Charging Party's exception.

We also find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(3) by its refusal to permit employee Reinaldo Mendoza to leave the facility for his wife's emergency and its written warning to him. The 8(a)(5) remedial relief for Respondent's unilateral change in its emergency leave policy renders the violation cumulative.

[5] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container*, 325 NLRB 17 (1997). We shall also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and the notice to conform to *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

B. The 8(a)(3) Allegation Discharging Employees Turienzo, Galvez, and Martin

The judge found, and we agree for the reasons set forth in his decision, that the Respondent discharged warehouse employees and union activists Alberto Turienzo, Humberto Galvez, and Jesus Martin in violation of Section 8(a)(3) and (1) of the Act because they participated in a union rally at Winn-Dixie Supermarket 235 on June 30, 1999.[6]

The Respondent argues that it discharged Turienzo, Galvez, and Martin because of misconduct inside the Winn-Dixie store during the rally. As fully discussed by the judge, union officials and the three alleged discriminatees entered the Winn-Dixie store to present a letter to the store manager soliciting Winn-Dixie's support for the Union's campaign at Goya. The judge rejected the Respondent's contention that the three employees engaged in misconduct that rendered their activities unprotected.[7]

The Respondent submits, among other things, that the judge erred by failing to draw an adverse inference from the Charging Party's failure to produce a videotape of the rally and its delay in producing a second videotape, both of which recorded the events inside the supermarket.

With regard to the first tape, counsel for the Charging Party represented at the hearing that it could not be located and that he had been informed by the videographer that the tape may have been taped over. There is no basis on the record to conclude that the Charging Party was responsible for the loss or for taping over the tape. Therefore, no adverse inference was warranted as to this videotape.

The second tape was admitted into evidence and all parties had a full opportunity to make their arguments regarding the tape and its contents. The Respondent had 6 days in which to prepare and present testimony based on this tape and failed to do so. The judge reviewed this tape, considered it with other credited evidence, and concluded that the record evidence substantially supported the General Counsel's and the Charging Party's version of events at the Winn-Dixie supermarket.[8] Under these circumstances, we agree with the judge that no adverse inference was warranted.

C. The 8(a)(3) Allegation Regarding Employee Bravo

The judge found**,** and we agree, that the Respondent violated Section 8(a)(3) and (1) by suspending and subsequently underemploying salesman Reinaldo Bravo because of his actions in support of the Union's health and safety issues with the Respondent. In particular, as set forth fully by the judge, on July 2, 1999, Bravo notified the Union of a rodent infestation that he discovered that day in a box of Respondent's barbeque sauce—"mojo sauce"—when he was stocking the shelves at Winn-Dixie Supermarket 366. Winn-Dixie subsequently banned Bravo from its supermarkets, and the Respondent thereafter suspended him. And, when Bravo lost two other accounts in September and October 1999, the Respondent failed to assign him any new stores to service, causing him to lose a significant portion of his income.

The Respondent contends that the allegations respecting Bravo should be dismissed because, among other things, it took no action against Bravo. Rather, according to the Respondent, its customers took action by insisting that Bravo not service their stores. In support of its exceptions, the Respondent moved that the judge admit into evidence a deposition of Winn-Dixie Grocery Merchandiser Paul Picard. The judge denied the Respondent's motion because the Respondent had failed to seek enforcement of its subpoena to have Picard testify. We adopt the judge's ruling, and note the following additional reasons for denying the Respondent's request. Picard's deposition was taken pursuant to a separate State court action to which the General Counsel was not a party and thus had no opportunity for cross-examination.[9] The Respondent did

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[6] Winn-Dixie, a supermarket chain, was a major customer of the Respondent.

[7] Chairman Battista and Member Liebman note that the Respondent also contends that whether or not Turienzo, Galvez, and Martin engaged in serious misconduct, it had a good-faith belief that they did, and that this belief justified their discharges. They reject that argument. Even assuming that the Respondent harbored such a belief, they agree with the judge that the employees did not engage in serious misconduct while participating in protected activities. Accordingly, their discharges were unlawful, regardless of the Respondent's motive.

[8] Member Schaumber concurs with his colleagues' finding that Respondent violated Sec. 8(a)(3) and (1) by discharging employees Turienzo, Galvez, and Martin because of their alleged participation in the June 20, 1999 rally at a Winn-Dixie store. Though the videotape demonstrates that the rally became highly disruptive after a number of participants entered the customer's store, all three of the discharged employees testified that they were asked to accompany representatives of the Union into the store to present a letter to the store's management, nothing more. The Respondent presented no evidence that the three employees actively participated in the boisterous shouting reflected on the tape, or the shoving testified to by one witness, or that the employees knew or reasonably should have known that such a disturbance was going to occur. This was a single incident and the disruption lasted just under 1 minute before the police intervened. Under the circumstances, Member Schaumber finds that the Respondent failed to show that the employees' participation in the rally warranted a loss of the Act's protection.

[9] According to the Respondent, counsel for the Charging Party served as Bravo's counsel in the State court action and had an opportunity to cross-examine Picard. However, the General Counsel is the prosecutor of this case. As such, he is entitled to cross-examine the Respondent's witnesses.

not apply to the judge to permit deposing Picard with all parties to this proceeding present. The Respondent could have done so, pursuant to the Board's Rules and Regulations Section 102.30. In addition, we find that the Respondent has failed to demonstrate how Picard's deposition testimony—if admitted into evidence and credited—would materially impact the findings and conclusions in this case. Accordingly, we find that the judge did not abuse his discretion in refusing to admit Picard's deposition into evidence.

Finally, although the judge found that the Respondent's suspension and underemployment of Bravo were unlawful, he declined to draw the inference that the Respondent unlawfully induced Winn-Dixie to ban Bravo from its supermarkets. The Charging Party excepts, and argues that the evidence demonstrates that the Respondent caused Winn-Dixie to ban Bravo from its stores.[10] We disagree. We find insufficient record evidence to support the Charging Party's contention. In this regard, former Goya Foods of Florida President Mary Ann Unanue was the only witness to testify about a July 6 meeting between representatives of Goya and Winn-Dixie regarding the latter's concerns over the rodent problem. Mary Ann Unanue testified that at that meeting she neither informed Winn-Dixie District Manager Paul Picard that she believed that Bravo had planted the rodents nor discussed with him the reasons for Bravo's ban. Finally, Mary Ann Unanue testified that she did not inquire then, nor did she subsequently learn, the reason for Winn-Dixie's decision. Thus, we find no merit in the Charging Party's exception.

D. The 8(a)(5) Allegation Change in Drivers' Routes and Salesmen's Stores

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally reassigning drivers' routes on at least five occasions, assigning between 10 and 50 new stores to salesmen, and reassigning existing stores[11] without affording notice to the Union and an opportunity to bargain. The judge found that, as the salesmen were compensated entirely through commission, these matters vitally impacted their earnings. He concluded that the assignment of routes and stores was a mandatory subject of bargaining, that the Respondent was obligated to bargain to impasse before implementing changes, and that the Respondent erroneously relied on past practice in justifying its unilateral acts. Finally, the judge concluded Respondent had no exigent business reason excusing its failure to notify or bargain with the Union concerning the assignments.

The Respondent contends that it had no obligation to bargain with the Union concerning these changes because it was maintaining its past practice. Also, according to the Respondent, the frequency with which it needed to make changes provided an exigent business justification for its unilateral action. Finally, the Respondent seeks to justify its conduct by suggesting that the unit lost no work as a result of its changes. We find no merit in these arguments.

As an initial matter, we find that the Respondent has failed to show a past practice that would justify making such changes without bargaining. Rather, the Respondent claimed, and it told the Union, that it would not bargain about these matters because "historically, all aspects of the selection; assignment and reassignment of routes have been within the sole discretion of Goya." Thus, the Respondent relied upon an asserted historic right to act unilaterally, as distinct from an established past practice of doing so. In our view, that right to exercise sole discretion changed once the Union became the certified representative. Accordingly, the Respondent no longer has a privilege to make these unilateral changes.

Further, we find that the Respondent failed to establish an economic exigency that would excuse it from bargaining. Assuming arguendo that it needed to act expeditiously on route and store assignments, it was nonetheless obligated to give adequate notice to the Union and offer an opportunity to bargain. See *RBE Electronics of S. D.*, 320 NLRB 80, 81–82 (1995).

Finally, even if the Respondent's contention that the unit did not lose work is correct, there is no requirement that the bargaining unit be adversely affected in order for there to be a violation of Section 8(a)(5). See *Exxon Research & Engineering Co.*, 317 NLRB 675 fn. 2 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996)(no requirement that the unit must lose something). In particular, the General Counsel need not show that there was a reduction in the amount of work performed by unit members in order to establish a violation. *University of Pittsburgh Medical Center,* 325 NLRB 443, 447 (1998), enfd. mem. 182 F.3d 904 (3d Cir. 1999). In any event, with respect to the warehouse unit, unit employees *did* lose work. Thus, on at

[10] The General Counsel did not specifically allege in the complaint that the Respondent violated the Act in this respect and he does not except to the judge's failure to make a finding.

[11] A reassigned store is a store that the Respondent transfers from one salesman to another for servicing. There are a variety of reasons for reassigning a store, e.g., the retirement of a salesman, or the Respondent's need, when a customer opens a new store, to redistribute stores among its sales force.

least one occasion, the Respondent assigned a driver's route to a temporary employee.[12]

E. Withdrawal of Recognition

The judge found that the Respondent's withdrawal of recognition from the Union in both units in December 1999 violated Section 8(a)(5) and (1) of the Act. The judge found that the disaffection petitions were the result of a lengthy course of unfair labor practices that resulted in the Union's loss of employee support. Further, the judge found that the disaffection petitions were tainted by management involvement in their circulation. Finally, the judge found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition as to the sales unit based on an employee petition circulated during the certification year.

The Respondent contends that it lawfully withdrew recognition from the Union based on a loss of majority support, and that, assuming arguendo that it committed unfair labor practices, the unlawful conduct did not taint the petitions, as that conduct was not causally connected to the employees' disaffection.

An employer may not avoid its duty to bargain if its own unfair labor practices caused the union's loss of majority support. See, e.g., *NLRB v. Williams Enterprises,* 50 F.3d 1280, 1288 (4th Cir. 1995). We affirm the judge's finding that the Respondent's unfair labor practices tainted the disaffection petitions. Therefore, the Respondent's withdrawals of recognition in both units violated Section 8(a)(5) and (1) of the Act. We apply *Lee Lumber & Building Material Corp*., 322 NLRB 175 (1996)(*Lee Lumber II*), enfd. in relevant part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997). In *Lee Lumber II*, the Board noted that "in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." 322 NLRB at 177. Compare, e.g., *Lexus of Concord, Inc.,* 343 NLRB 851 (2004) (causal connection not established); *LTD Ceramics*, 341 NLRB 86 (2004) (causal connection not established), and *AT Systems West, Inc.,* 341 NLRB 57, 60–61 (2004) (causal connection established). As set forth below, we find that the General Counsel has clearly established the requisite causal connection.

In *Master Slack Corp.*, 271 NLRB 78 (1984), the Board set forth a four-part test to determine whether a causal relationship exists between the unfair labor practices and employee disaffection, thereby tainting or precluding a lawful withdrawal of recognition:

> (1) [t]he length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. [Id. at 84.]

Proximity in time. The Respondent unlawfully discharged three employees in the warehouse unit on July 7, 1999. In addition, in early July, as discussed above, the Respondent unlawfully suspended and began to underemploy Reinaldo Bravo, a sales unit employee. In late August, employees in the sales unit began circulating a disaffection petition, just over 1 month after the Respondent's substantial 8(a)(3) violations. The warehouse unit disaffection petition began circulating in early December—shortly before December 15, the date the Respondent received the petition. Throughout the year and concurrent with the circulation of both disaffection petitions, the Respondent unilaterally and unlawfully assigned and reassigned salesmen's stores and changed drivers' routes. The Respondent continued throughout the year to refuse to recognize and deal with union-designated employee representatives. Indeed, the Respondent's widespread and unrelenting pattern of unlawful conduct continued from the beginning until the end of the certification year. Thus, we find that the Respondent's unfair labor practices had a strong temporal nexus with both employee petitions.

Nature of the unfair labor practices, possibility of a detrimental or lasting effect on employees, and tendency to cause disaffection from the Union. The Respondent's discharge of three active union adherents and its suspension and underemployment of a fourth were hallmark violations that were highly coercive and likely to remain in the memories of employees for a long time. See generally *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980) (the court concluded that an employer's discharge of an active union adherent would likely "have a lasting inhibitive effect on a substantial percentage of the work force" and remain in employees' memories for a long period). Fur-

[12] In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) by its increased use of temporary drivers, we find the violation based on the Respondent's increased assignment of unit work to temporary employees regularly used as drivers. In at least one instance, the Respondent assigned a unit driver's vacated route to a temporary driver rather than to a unit driver.

We affirm the judge's order that the Respondent make the unit employees whole for any losses resulting from the unlawful unilateral changes. Contrary to the judge, however, make-whole relief for those violations shall be awarded in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

ther, in this exact context of an employer's withdrawal of recognition, the Board has stated:

> [i]t is well settled that the discharge of an active union supporter is exceptionally coercive and not likely to be forgotten . . . and reinforces the employees' fear that they will lose employment if they persist in union activity.

Penn Tank Lines, 336 NLRB 1066, 1068 (2001) (footnote and citations omitted).

Further, the Respondent's unilateral changes in drivers' routes, salesmen's store assignments, radio phone policy, and emergency leave policy; its increased use of temporary drivers; and its refusal to recognize union-designated representatives are also the types of violations likely to have a lasting and negative impact on employees' support for the Union. *Bridgestone/Firestone, Inc.,* 332 NLRB 575 (2000), affd. in relevant part sub nom. mem. *Teamsters Local 481 v. NLRB,* 47 Fed. Appx. 449 (9th Cir. 2002) (direct dealing and bypassing bargaining representative tend to have a lasting effect on employees); *NLRB v. Vincent Industrial Plastics*, 209 F.3d 727, 733 (D.C. Cir. 2000) (unilateral implementation of changes in working conditions has the tendency to undermine confidence in the employees' chosen collective-bargaining agent). The Respondent's unilateral changes—particularly those regarding route and store assignments and the increased use of temporary employees—involved the important "bread and butter" issues that lead employees to seek union representation. As previously noted, the judge found that these matters vitally impacted employee earnings. The Board stated in *Broadway Volkswagen*, 342 NLRB 1244, 1247 (2004): "[s]uch [unilateral] changes, particularly where the Union is bargaining for its first contract, can have a lasting effect on employees." Further, as the Board found in *Penn Tank Lines,* supra, 336 NLRB at 1067: "[w]here unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long lasting effect on employee support for the union is clear." The Respondent's substantial and widespread violations would reasonably lead employees to conclude the Union could not protect or help them and would reasonably tend to coerce employees into abandoning support for the Union.

The effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. The evidence demonstrates that Respondent's unfair labor practices resulted in the Union's loss of support. Employees from both the sales unit and the warehouse unit testified they had knowledge of the Respondent's widespread unlawful actions. With respect to the sales unit, salesmen testified that they were aware of salesman Bravo's situation and that it was well known and much discussed. In this regard, in company sales meetings beginning in August 1999 with Frank Unanue, some unit employees raised the Bravo matter as a topic of concern. The Respondent caused Bravo to lose work and income from commissions because of his union activity. Accordingly, the salesmen's subsequent disaffection from the Union is reasonably tied to the Respondent's unfair labor practices.

With regard to warehouse unit, prior to the Turienzo, Martin, and Galvez discharges, there had been significant union activity, consisting of three 1-day strikes, a consumer boycott, leafleting, and petition drives. Twenty to 25 employees typically participated. Employee support for the Union declined shortly after the Respondent discharged the three union adherents and suspended and underemployed a fourth employee. In particular, after the Union informed the employees that it could not immediately get the unlawfully discharged employees' jobs back, employee participation in union activity dramatically decreased. As noted, the Respondent consistently refused to meet and discuss personnel and other issues with union-designated representatives. By August 28, only 10 employees appeared at union events, and on September 4 and on October 1, 1999, respectively, only 7 and 2 employees showed up. This consistent decrease in support, occurring during the same period as numerous serious unfair labor practices, indicates strongly that the Respondent's unfair labor practices effectively undercut employee support for the Union and caused this employee disaffection.

Thus, under *Master Slack*, supra, the Respondent's substantial and continuing unfair labor practices tainted the disaffection petitions, and these petitions do not provide a basis for a lawful withdrawal of recognition.[13]

REMEDY

We agree with the judge that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to

[13] In view of this finding, we find it unnecessary to pass on the Respondent's further exceptions to the judge's findings that the Respondent's aid in circulating the disaffection petitions also violated Sec. 8(a)(5), and that the Respondent unlawfully withdrew recognition from the sales unit based on circulation of the petition during the certification year.

bargain with the lawful collective-bargaining representative of an appropriate unit of employees." The U.S. Court of Appeals for the District of Columbia, however, has required the Board to justify its imposition of the order on the facts of each case. In *NLRB v. Vincent Industrial Plastics*, 209 F.3d 727(D.C. Cir. 2000), the court required the Board to balance: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violation of the Act. Having done so, we find an affirmative bargaining order is warranted in the instant case.[14]

An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the rights of collective bargaining by the Respondent's unlawful withdrawal of recognition. An affirmative bargaining order, with its attendant bar to challenging the union's continued majority status for a reasonable time, does not unduly prejudice the Section 7 rights of those employees who may oppose continued union representation, because the duration of the order is no longer than is reasonably necessary to remedy the effects of the violations.

The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. Further, as noted above, the Respondent's unilateral changes in drivers' routes, salesmen's stores, radio phone policy, and emergency leave policy; its increased use of temporary drivers; and its nonrecognition of union designated representatives also are the types of violations likely to have a lasting and negative impact on employees' support for the Union.

An affirmative bargaining order is especially warranted because most of the Respondent's unfair labor practices occurred throughout the initial certification year. By this conduct, the Respondent substantially undermined the Union's opportunity to effectively bargain, without unlawful interference, during the period when unions are usually at their greatest strength. Because the Union was not given a truly fair opportunity to reach an accord with the Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees will be able to assess for themselves the Union's effectiveness as a bargaining representative.

A cease-and-desist order without a temporary decertification bar would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those presented here, where many of Respondent's unfair labor practices are of a continuing nature and are likely to have a continuing effect.

Following the election, the Respondent made numerous unilateral changes in violation of Section 8(a)(5) affecting the employees' terms and conditions of employment without ever notifying the Union or giving the Union an opportunity to bargain over the changes. The Respondent also refused to recognize the Union's duly appointed representatives, unlawfully discharged three unit employees, and suspended and underemployed a fourth employee for engaging in union activity. These violations are likely to have a long lasting and negative impact on union support, effects that will not be remedied without the Union being offered time to prove itself to the two units—an event that is less likely absent a decertification bar. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees opposed to continued union representation.

For these reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Goya Foods of Florida, Miami, Florida, its officers, agents, successors, and assigns, shall

[14] Chairman Battista and Member Schaumber do not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." They agree with the United States Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Saginaw Control & Engineering, Inc*., 339 NLRB 541, 546 fn. 6 (2003); see also *Flying Foods*, 345 NLRB 101, 109 fn. 23 (2005). They recognize, however, that the view expressed in *Caterair International*, supra, represents extant Board law. Regardless of which view is applied to the instant case, Chairman Battista and Member Schaumber agree that an affirmative bargaining order is warranted here.

1. Cease and desist from

(a) Unlawfully discharging, suspending, refusing to assign available work to, or otherwise discriminating against its employees to discourage them from supporting UNITE HERE, CLC, or any other labor organization, or because they engage in union or other activities protected by Section 7 of the Act.

(b) Reassigning the routes of drivers who were either discharged or otherwise temporarily or permanently separated from their employment without notice to and bargaining with the Union.

(c) Disproportionately increasing the number of temporary employees used as regular drivers, and assigning bargaining unit work to them, without notice to and bargaining with the Union.

(d) Refusing to recognize the authority of employees designated by the Union to represent Respondent's employees for the purposes of adjusting grievances or otherwise representing employees.

(e) Discontinuing established policies, including the liberal granting of employees requests for leave during the workday to tend to personal or family emergencies, without notice to or bargaining with the Union.

(f) Disciplining employees, including Reinaldo Mendoza, for the violation of policies unilaterally implemented without prior notification to the Union and without affording the Union an opportunity for meaningful bargaining.

(g) Assigning sales accounts to sales personnel without notice to or bargaining with the Union.

(h) Discontinuing the policy of allowing employees to retain company-provided cellular radio phones during their nonworking hours without notice to or bargaining with the Union.

(i) Withdrawing recognition from the Union as the collective-bargaining representative of employees in the unit of all full-time and regular part-time drivers, forklift operators, production, maintenance, and warehouse employees employed at Goya Foods of Florida (the warehouse and drivers unit), and refusing to meet and bargain in good faith with the Union.

(j) Withdrawing recognition from the Union as the collective-bargaining representative of employees in the unit of all full-time and regular part-time sales representatives and merchandisers employed at Goya Foods of Florida (the sales and merchandisers unit), and refusing to meet and bargain in good faith with the Union.

(k) Informing employees that it would be futile for them to select a union, or to continue to support a union, as their collective-bargaining representative because the Respondent would never recognize or negotiate with it.

(l) Interrogating employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(m) Threatening employees with the elimination of their jobs, or the subcontracting of their work, if they engage in union activities.

(n) Threatening employees with the loss or reduction of pension, or other benefits if they support the Union or any other labor organization.

(o) Threatening employees that it would close the company and move the Respondent's operations out of state if employees selected the Union as their collective-bargaining representative.

(p) Threatening employees with underemployment if they engage in union activities.

(q) Requesting employees to ascertain and disclose to Respondent the union membership, activities and sympathies of other employees.

(r) Soliciting grievances from employees and promising to adjust these grievances if the employees cease engaging in union activities.

(s) Promising to relieve employees of disagreeable assignments if they cease supporting the Union or any other labor organization.

(t) Informing employees that it would not recognize the authority of employees designated by the Union, or other labor organization, to represent employees for the purposes of adjusting grievances and otherwise representing them.

(u) Threatening employees with assaults on their union representatives if employees engaged in union activities.

(v) Ordering employees not to wear union paraphernalia at sales meetings or anywhere at the Respondent's facility.

(w) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Alberto Turienzo, Jesus Martin, and Humberto Galvez whole, with interest, for any loss of earnings and other benefits that they may have suffered as a result of their discharges from the Respondent on July, 7, 1999, in the manner set forth in the remedy section of the judge's decision.

(b) Within 14 days from the date of this Order, offer Alberto Turienzo, Jesus Martin, and Humberto Galvez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions,

without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Reinaldo Bravo whole, with interest, for any loss of earnings and benefits that he may have suffered as a result of his suspension and the Respondent's subsequent refusal to restore him to the number of customer accounts he serviced prior to his removal from Winn-Dixie Supermarket 366 on July 7, 1999, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, restore to Reinaldo Bravo the number of customer accounts he serviced prior to July 2, 1999.

(e) Make whole unit employees in both certified bargaining units for any loss of wages or other benefits they may have suffered as a result of the Respondent's unlawful unilateral actions, including assigning routes to drivers since October 14, 1998, assigning stores to salesmen since November 23, 1998, and disproportionately increasing the number of temporary employees regularly employed as drivers, in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

(f) Make whole warehouse and driver unit employees for any losses occasioned by the Respondent's unilateral rescission of the policy of allowing employees to take company-provided radio phones home with them, in the manner set forth in *Ogle Protection Service,* supra.

(g) Recognize and upon request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following certified collective-bargaining units:

> All full-time and regular part-time drivers, forklift operators, production, maintenance and warehouse employees employed by the Employer at its facility located at 1900 NW 92nd Avenue, Miami, Florida 33172; excluding all other employees, employed by outside agencies and other contractors, office clerical employees, managerial employees, guards and supervisors as defined in the Act.
>
> All sales representatives and merchandise employees employed by the Employer at its facility located at 1900 NW Avenue, Miami, Florida 33172; excluding all office clericals, guards and supervisors as defined in the Act.

(h) Upon the Union's request, rescind any unilaterally implemented changes made in the terms and conditions of employment of employees in the warehouse and drivers unit since October 14, 1998, and of employees in the sales and merchandisers unit since November 23, 1998; provided, however, that the Respondent shall not be required to cancel favorable changes the Union wishes to leave in place.

(i) Upon request, meet and adjust grievances with the Union's designated representatives for collective bargaining or grievance adjustment purposes, including employee representatives.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its Miami, Florida facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2, 1998.

(l) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions taken against Alberto Turienzo, Humberto Galvez, Jesus Martin, Reinaldo Bravo, and Reginaldo Mendoza, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

(m) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully discharge, suspend, refuse to assign available work to, or otherwise discriminate against our employees to discourage them from supporting UNITE HERE, CLC (the Union), or any other labor organization, or because they engage in union or other protected activities listed above.

WE WILL NOT reassign the routes of drivers who are either discharged or otherwise temporarily or permanently separated from their employment without notice to or bargaining with the Union.

WE WILL NOT disproportionately increase the number of temporary employees regularly employed as drivers and assign bargaining unit work to them, without notice to and bargaining with the Union.

WE WILL NOT assign sales accounts to sales personnel without notice to and bargaining with the Union.

WE WILL NOT refuse to recognize the authority of employees designated by the Union to represent our employees for the purposes of adjusting grievances or otherwise representing employees.

WE WILL NOT discontinue established policies, including the granting of employee requests for leave during the workday to tend to personal or family emergencies, without notice to and bargaining with the Union.

WE WILL NOT discipline employees including Reinaldo Mendoza for the violation of policies unilaterally implemented, without prior notification to the Union and without affording the Union an opportunity for meaningful bargaining.

WE WILL NOT discontinue the policy of allowing employees to retain company-provided radio phones during their nonworking hours without notice to and bargaining with the Union.

WE WILL NOT withdraw recognition from the Union as the collective-bargaining representative of employees in the unit of all full-time and regular part-time drivers, forklift operators, production, maintenance and warehouse employees employed at Goya Foods of Florida and refuse to meet and bargain in good faith with the Union.

WE WILL NOT withdraw recognition from the Union as the collective-bargaining representative of employees employed in the unit of all full-time and regular part-time sales representatives and merchandisers employed at Goya Foods of Florida and refuse to meet and bargain in good faith with the Union.

WE WILL NOT inform employees that it would be futile for them to select a union or to continue to support a union as their collective-bargaining representative because we would never recognize or negotiate with it.

WE WILL NOT interrogate employees about their union membership, activities, and sympathies or the union membership, activities, and sympathies of other employees.

WE WILL NOT threaten employees with the elimination of their jobs, or the subcontracting of their work, if they engage in union activities.

WE WILL NOT threaten employees with the loss or reduction of benefits if they support the Union or any other labor organization.

WE WILL NOT threaten employees that we will close the company and remove our operations out of State if employees select the Union, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT threaten employees with underemployment if they engage in union activities.

WE WILL NOT request that employees ascertain and disclose to us the union membership, activities, and sympathies of other employees.

WE WILL NOT solicit grievances from employees and promise to adjust those grievances if employees cease engaging in union activities.

WE WILL NOT promise to relieve employees of disagreeable assignments if they cease supporting the Union, or any other labor organization.

WE WILL NOT inform employees that we will not recognize the authority of employees designated by the Union to represent employees for the purposes of adjusting grievances and otherwise representing them.

WE WILL NOT threaten employees with assaults on their union representatives if employees engage in union activities.

WE WILL NOT order employees not to wear union paraphernalia at sales meetings, or anywhere at our facilities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Alberto Turienzo, Jesus Martin, and Humberto Galvez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make Alberto Turienzo, Jesus Martin, and Humberto Galvez whole for any loss of earnings and other benefits they may have sustained as a result of their unlawful discharges on July 7, 1999, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, restore to Reinaldo Bravo the number of customer accounts he serviced prior to July 2, 1999.

WE WILL make Reinaldo Bravo whole, with interest, for loss of earnings and benefits he may have sustained as a result of his unlawful suspension and our refusal to restore to Bravo the number of customer accounts he serviced prior to his removal from Winn-Dixie Store 366 and his subsequent removals from two La Mia stores.

WE WILL make unit employees in both certified bargaining units whole, with interest, for any loss of wages or benefits they may have sustained as a result of our unlawful unilateral actions, including assigning routes to drivers since October 14, 1998, assigning stores to salesmen since November 23, 1998, and disproportionately increasing the number of temporary employees regularly employed as drivers.

WE WILL make warehouse and driver unit employees whole, with interest, for any losses occasioned by our unilateral rescission of the policy of allowing employees to take company-provided radio phones home.

WE WILL recognize and, on request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the two certified collective-bargaining units.

WE WILL, upon the Union's request, rescind any unilaterally implemented changes we made in the terms and conditions of employment of unit employees in the warehouse and drivers unit since October 14, 1998, and in the sales and merchandising unit since November 23, 1998; provided, however, that we will not cancel favorable changes the Union wishes to leave in place.

WE WILL, upon request, meet and adjust grievances with the Union's designated representatives for collective-bargaining or grievance adjustment purposes, including employee representatives.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful actions taken against employees Alberto Turienzo, Jesus Martin, Humberto Galvez, and Reinaldo Bravo, and Reinaldo Mendoza, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that our unlawful actions will not be used against them in any way.

GOYA FOODS OF FLORIDA

Arturo Ross, Esq., Jennifer Burgess-Solomon, Esq., and *Hector Nava, Esq.,* for the General Counsel.

James Crosland, Esq., Denise Heekin, Esq., and *Carlos Ortiz, Esq.,* for the Respondent.

Ira Katz, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me on 13 days between June 5 and 21, 2000. The consolidated complaint was issued by the Acting Regional Director for Region 12 of the National Labor Relations Board (the Board) on April 18, 2000, and is based on charges filed by the Union of Needletrades, Industrial and Textile Employees, AFL–CIO/CLC (UNITE, or the Union, or the Charging Party) commencing on September, 16, 1998, and thereafter. The complaint as amended alleges that Respondent Goya Foods of Florida (Goya, or the Company, or Respondent) has committed violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent has by its answer duly filed, denied the commission of any violations of the Act.

On the entire record including the testimony of the witnesses and the exhibits received in evidence and after review of the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits and I find that at all times material herein during the 12-month period preceding the filing of the complaint, the Respondent has been a Delaware corporation, with an office and place of business in Miami, Florida, where it has been engaged in the wholesale distribution of food products and in conducting its business operations, it purchased and received at its Miami, Florida facility, goods and materials valued in excess of $50,000 directly from points located outside the State of Florida, and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNITS

The complaint alleges, Respondent admits, and I find that at all times material herein the following employees of Respondent (the units) constituted two separate units appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

1. The following employees of Respondent called the warehouse employees and drivers unit:

> All full-time and regular part-time drivers, forklift operators, production, maintenance and warehouse employees, employed by the Employer at its facility located at 1900 NW 92nd Avenue, Miami, Florida 33172; *excluding* all other employees, employees employed by outside agencies and other contractors, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

On October 26, 1998, the Union was certified as the exclusive collective-bargaining representative of the warehouse employees and drivers unit and has at all times since October 26, 1998, been the exclusive collective-bargaining representative of the warehouse employees and drivers unit by virtue of Section 9(a) of the Act.

2. The following employees of Respondent called the sales representatives and merchandising employees unit:

> All sales representatives and merchandise employees employed by the Employer at its facility located at 1900 NW 92nd Avenue, Miami, Florida 33172; *excluding* all office clericals, guards and supervisors as defined in the Act.

On December 4, 1998, the Union was certified as the exclusive collective-bargaining representative of the sales representatives and merchandising employees unit and has at all times since December 4, 1998, been the exclusive collective-bargaining representative of the sales representatives and merchandising employees Unit by virtue of Section 9(a) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Goya is the largest wholesaler of Hispanic food products in the United States and operates in several other States and Puerto Rico as well as in Miami, Florida, where it operates the warehouse facility involved in these cases. In October 1998, the employees in the warehouse and drivers unit voted to select the Union as their exclusive collective-bargaining representative. In November 1998, the employees in the sales representatives and merchandising employees unit voted to select the Union as their exclusive collective-bargaining representative. The Union and Respondent commenced bargaining on behalf of the warehouse and drivers unit in December 1998, and met approximately once a month thereafter until June 1999. Bargaining on behalf of the sales representatives and merchandising employees unit commenced in March 1999, with the parties engaging in approximately four bargaining sessions. Bargaining for both units was unsuccessful and the Union engaged in work stoppages, one in January 1999, one on Good Friday in 1999, and one on Memorial Day in 1999 and in further action in June 1999, when it demonstrated on a parking lot near a store of Respondent's largest customer, Winn-Dixie.

The allegations in this complaint consist of a number of 8(a)(1) allegations wherein the Respondent is alleged to have violated employees Section 7 rights by engaging in interrogation, made promises and issued threats to employees in order to discourage the employees support for the Union. The Respondent is also alleged to have violated Section 8(a)(3) and (1) of the Act by its discharge of three employees who entered a Winn-Dixie store along with several union officials and non-Goya employee supporters, and by the removal and failure to replace three stores from the stores which had been assigned to an employee salesman who contended he had found a nest of rodents in a box of Goya product (a spicy barbecue sauce called "Mojo") while he was servicing a Winn-Dixie store. Respondent is also alleged to have violated Section 8(a)(5) of the Act by refusing to permit union designated employee representatives to represent its employees in the appropriate unit and to have implemented several unilateral changes in the terms of employment and the working conditions of the employees in the appropriate units without notifying the Union of the changes and affording the Union an opportunity to bargain concerning these changes. The complaint does not allege surface bargaining on the part of Respondent. The complaint also alleges that Respondent unlawfully withdrew recognition from the Union with respect to both units. Respondent has denied the commission of any violations of the Act.

B. The 8(a)(1) Allegations

The General Counsel presented a number of employees of Goya who testified concerning various alleged acts of interrogation, promises of benefits and threats by members of Goya's management and supervisory staff. Respondent presented witnesses who testified concerning certain but not all of these alleged violations of the Act.

Mary Ann Unanue was the president of the Goya warehouse in Miami, Florida, from 1995 to 1999. On September 2, 1998, the Union filed its petition for certification in the warehouse and drivers unit. On September 4, 1998, President Mary Ann Unanue, Personnel Director Maria Cristina Banos, and Warehouse Operations Manager Sergio Bazain met with a group of four warehouse employees including Arturo Jimenez and Francisco Cabrera at the warehouse. Cabrera testified that at this meeting President Mary Ann Unanue asked the employees "if they knew anything about the Union" and that the employees denied knowing anything about the Union. He testified that she then told the employees she would never allow the Union into her office or into the Company. She asked the employees if they knew the Union was distributing flyers at the door of the warehouse. They also denied knowledge of this. She then told the employees to report anything they found out about the Union to her, Maria Cristina Banos, or Sergio Bazain.

I credit Cabrera's testimony as set out above which was not specifically denied by Mary Ann Unanue who testified only in general terms that she did not interrogate or threaten employees and that she had not informed employees that she would not negotiate with the Union. Neither Banos nor Bazain were called to testify. Mary Ann Unanue attributed testimony by various employees concerning statements made by her and interrogation engaged in by her to possible confusion on the part of the employees concerning what she said, because her primary language is English whereas the primary language of the employees was Spanish and she spoke to them in Spanish. However, I credit the testimony of Cabrera

and the other current employees who testified infra concerning these allegations of Section 8(a)(1) committed by Mary Ann Unanue. I do not find that their recall of the remarks made and interrogation engaged in by Mary Ann Unanue was attributable to language difficulties. Rather I find a consistent theme of unlawful interrogation and threats to employees in order to defuse the union campaign.

I find that Respondent violated Section 8(a)(1) of the Act by Mary Ann Unanue's statement that she would never allow the Union into her office thus conveying the futility of the employees' support of the Union, *Wellstream Corp.,* 313 NLRB 698, 706 (1994). Her interrogation of the employees concerning their knowledge of union activities was also coercive in violation of Section 8(a)(1) of the Act, *Structural Composites Industries*, 304 NLRB 729 (1996), as was her request that employees report any information about union activities, *Greenfield Die Mfg. Corp.*, 327 NLRB 237 (1998); *State Equipment, Inc.*, 322 NLRB 631 (1996).

Warehouse employee Eddie Mirjares testified concerning another occasion on or about September 4, 1998, when Mary Ann Unanue met with a group of warehouse employees including Mirjares, Ray Quesda, and Falcone. Mirjares testified that she told these employees that she would not negotiate with the Union even if it won the election. This was a message she repeated in the many meetings she had with the warehouse and driver unit employees prior to the representation election. Current employee, driver Rodolfo Chavez testified that she repeated the message in meetings from September to October 14, 1998, that she would never recognize or bargain with the Union. Warehouse employee Alberto Turienzo testified that at several meetings he attended held by Mary Ann Unanue, she stated that she would never recognize or bargain with the Union.

I credit the foregoing testimony of employees Mirjares, Chavez, and Turienzo, and find that these statements of Respondent's president, Mary Ann Unanue, were violative of Section 8(a)(1) of the Act. These statements that she would not recognize or bargain with the Union conveyed to the employees that their support of the Union was futile as the Respondent would not recognize or bargain with the Union even if the employees selected it as their collective-bargaining representative. *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995); *Wellstream Corp.*, supra.

Driver Rolando Aguiar testified that in September or early October 1998, Mary Ann Unanue, Maria Cristina Banos, and Sergio Bazain met with him in Mary Ann Unanue's office where Mary Ann Unanue asked him if he knew anything about the Union or if he had knowledge of union activity and asked him if he was a member of the Union. He denied any knowledge of the Union. Mary Ann Unanue told him there was a union campaign ongoing and that the union people wanted to "implement" a union at the Company which she would never let happen as she would never recognize the Union.

I credit Aguiar's testimony and find that Mary Ann Unanue's interrogation of Aguiar was coercive and her threat that she would never recognize the Union was a threat of the futility of supporting the Union. By this interrogation Respondent violated Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1984). By this threat Respondent violated Section 8(a)(1) of the Act. *Structural Composites Industries*, supra; and *Soltech, Inc.*, 306 NLRB 269 (1992).

Mary Ann Unanue met with three drivers including Rodolfo Chavez in her office in September 1998 and in the presence of Personnel Director Banos and Warehouse Operations Manager Bazain. At that meeting she asked the three drivers if they knew anything about the employees' efforts to bring in a union. All three drivers denied knowledge of a union. This interrogation was coercive and violative of Section 8(a)(1) of the Act. *Rossmore House*, *supra*; *Sunnyvale Medical Clinic*, supra; *Gardener Engineering*, 313 NLRB 755 (1994); and *Structural Composites Industries*, supra.

Driver Rodolfo Chavez testified that in September 1998, Mary Ann Unanue told the employees that if they were organizing a union to prevent the Company from terminating the drivers or converting their positions to that of independent contractors, they were mistaken as her plans to convert these positions to private contractors would proceed. At that point she turned to her labor counsel, James Crosland, who was in attendance and asked if she had the legal right to do so. According to Chavez, Crosland informed her that she could subcontract the work if the decision were based on economic considerations other than labor costs. However, Chavez testified that the legal advice was given by Crosland in English and was not translated into Spanish for the predominately Spanish-speaking drivers.

The General Counsel contends that Mary Ann Unanue's statement to these employees was violative of Section 8(a)(1) of the Act because it "was a highly coercive threat of job loss impressing on the employees that union representation would not deter Unanue from making unilateral changes to employees working conditions." In support thereof, the General Counsel cites *MPG Transport, Ltd.*, 315 NLRB 489 (1994), where a threat that employees would lose their jobs through subcontracting *due* to their choosing a union representative was found to be violative.

I find that the evidence concerning this allegation is sufficient to establish a violation of the Act. This statement by Mary Ann Unanue even as clarified by her legal counsel was a threat that the Employer could make a decision to subcontract without regard to the Union. It was a threat of futility that Respondent would subcontract regardless of their choice of a union representative. I find the statement by Mary Ann Unanue violated Section 8(a)(1) of the Act.

Driver Freddy Purchales testified that on September 8 or 9, 1998, he and another driver Tomas (Hernandez) were waiting outside of President Mary Ann Unanue's office and were approached by Personnel Manager Banos who told them that Mary Ann Unanue was interviewing drivers and other employees who were involved with the Union. Banos then asked Purchales if he was involved with the Union. When he replied that he was, Banos told him to wait until they could see him. After a 10- to 15-minute wait, Banos told him that Mary Ann Unanue would not be able to see him that date but would "take care of him" another day. Banos explained to Puchales that they were meeting with employ-

ees to dissuade them from supporting the Union by explaining why it was not "convenient" or in their best interest to support the Union.

I credit the testimony of Purchales which was unrebutted as Banos was not called to testify. I find that Respondent violated Section 8(a)(1) of the Act by Banos' interrogation of Purchales and Hernandez which was clearly coercive and had the tendency to interfere with their Section 7 rights to support a union. *Structural Composites Industries*, supra.

Warehouse employee Miguel Then testified that in early September 1998, Warehouse Operations Manager Sergio Bazain telephoned him and asked if he had signed a union (authorization) card. Then replied that he had. Bazain asked him if he had thought it through and told him that the laws of Florida were not favorable for union organizing. Then told Bazain that he had thought about it and would wait to see how it came out.

I credit the testimony of Then which was unrebutted as Bazain was not called to testify. I find that Respondent violated Section 8(a)(1) of the Act by Bazain's interrogation of Then which was clearly coercive. *Kentucky May Coal Co.,* Inc.*,* 317 NLRB 60, 62 (1995).

Then also testified that in early to mid-September 1998, Mary Ann Unanue spoke to him in her office. Personnel Manager Banos was also present. Unanue told Then she had received a petition indicating that a certain percentage of the employees wanted to be represented by a union. She asked Then if he knew anything about it and told him to be careful with the "union thing" because they would approach him. She told him to remember that unions only bring problems. She cited Eastern Airlines and contended that the "union had forced them into bankruptcy." Unanue also told Then that Goya would never negotiate with the Union.

I credit the testimony of Then which was not specifically rebutted by Mary Ann Unanue and was not rebutted by Banos who was not called to testify. I find that the questioning of Then by Unanue was coercive under the totality of the circumstances and that Respondent violated Section 8(a)(1) of the Act thereby. The statement that Goya would never negotiate with the Union which was an unlawful threat of the futility of supporting the Union was thus also violative of Section 8(a)(1) of the Act.

Driver Rodolfo Chavez also testified that between mid-September and October 1998, Mary Ann Unanue held a meeting with the Goya drivers and showed them a video describing the bargaining process. She then told the drivers that if they chose union representation "bargaining could commence at zero, and (employees) could lose the benefits they enjoyed."

I credit the testimony of Chavez which was not specifically rebutted by Mary Ann Unanue. I find that her statement was a threat of a loss of benefits if the employees chose union representation. Her emphasis on the commencement of bargaining at zero was an implied threat that benefits could be lost or reduced to entry levels. There is no specific evidence that Mary Ann Unanue explained the overall give and take of bargaining in this case but rather she focussed on the potential loss of benefits. *Webco Industries,* 327 NLRB 172 (1998); *Lear Siegler Management Service*, 306 NLRB 393 (1992).

Warehouse employee Alberto Tuinezo (one of three employees discharged by Respondent alleged as discriminatees in this case) testified that in late September 1998, he showed Warehouse Supervisor Jose Valdez a flyer he had received from union representatives who were leafleting at Goya. He told Valdez that the union representatives might give Valdez a flyer if he went to the area where they were distributing the flyers. Valdez replied that "if they gave him a flyer he would have a discussion with them and he might end up hitting someone from the Union." At the hearing Turienzo conceded that he did not feel physically threatened by Valdez' statement.

I credit Turienzo's testimony which was unrebutted. I find the statement made by Respondent's supervisor was violative of Section 8(a)(1). Although the threat made by Valdez was apparently not taken literally by Turienzo, it was nonetheless coercive as it was clearly indicative of Respondent's antiunion animus and the hostility of Respondent with the possibility of adverse employment actions with which Respondent might respond to union activities engaged in by its employees.

Turienzo also testified that in early October 1998, Mary Ann Unanue announced to a group of warehouse employees at a meeting in the conference room that any employee who was a member of the Union would not be able to participate in the Company's pension plan. She told the employees she would only respect the Company's obligation regarding pension benefits for employees who "did not belong to the Union." Mary Ann Unanue testified she did not threaten to deprive members of pension benefits but explained to employees that their current pension plan would be negotiable subject to collective bargaining. . . . . "that sometimes a union brought in their own pension plan and that employees would only be entitled to one pension plan, not two pension plans." She acknowledged she was uncertain if "there was a misinterpretation in that situation . . . (she) had some difficulty explaining some of the stuff to them in Spanish." Employee Miguel Then testified that in January 1999, he received a retirement benefits plan letter in the mail from Respondent which presumably was mailed to all the warehouse and driver unit employees. The letter was signed by Personnel Manager Banos. The first line of the letter, stated that Goya Foods was pleased to provide employees who did not belong to the Union with the enclosed information regarding their pension benefits. Then testified the letter frightened employees that Goya would not honor its pension obligations to union members. The General Counsel contends in his brief that the "intended effect of this letter was to instill fear in employees and thereby compromise employee support for the Union."

I credit the testimony of Turienzo and Then as set out above and as supported by the above cited letter sent to employees in January 1999, notwithstanding Mary Ann Unanue's denial as qualified by her. I find that the effect on the employees of Mary Ann Unanue's comments and the above statement contained in the letter was to coercively create the impression and threaten that they could or would lose their pension benefits if they became members of the Union. I

find that both Mary Ann Unanue's comments and the letter were violative of Section 8(a)(1) of the Act. See *Niagra Wires*, 240 NLRB 1326 (1979); cf. *KEZI, Inc.*, 300 NLRB 594 (1990).

Turienzo testified that at a meeting in early October 1998, and several later meetings held with the drivers and warehouse employees, Mary Ann Unanue threatened employees that if they voted for the Union in the upcoming representation election, Respondent could close and leave the State. Mary Ann Unanue denied ever making such threats.

I credit Turienzo's testimony in this regard and find that this statement was violative of Section 8(a)(1) of the Act. The threat of closure and leaving the state was not based on objective fact and clearly implied that Respondent might close and leave the State for reasons unrelated to economic necessities. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969).

Turienzo testified concerning a meeting in the Goya dining room between September and October 1998. Present were employees Luis Castillo, Maria Oramas, and Turienzo and Managers Banos, Bazain, and Mary Ann Unanue. Unanue specifically asked Turienzo if he had signed a union card. He admitted having done so. She then asked the other two employees if they had signed a union card and they denied having done so. Mary Ann (in reference to Turienzo's admission that he had signed a union card) stated she could not believe what had become of the Goya family and that she could not believe what she had heard.

I credit Turienzo's testimony which was unrebutted by Mary Ann Unanue during her testimony nor by Banos and Bazain who were not called to testify. I find that Mary Ann Unanue's questioning of these employees and her disapproving comments regarding Turienzo's affirmative reply to her inquiry whether he had signed a union card were coercive and violative of Section 8(a)(1) of the Act. *Pleasant Manor Living Center*, 324 NLRB 368 (1997).

Miguel Then testified that at meetings held between September 15 and October 1998, with drivers and warehouse employees, attended by Domingo Villar, Vladimir Romero, Torres, and Then, Mary Ann Unanue told employees that if the Union won the election, employees could lose benefits because negotiations would start at zero, half or nothing. Then told her she had not convinced him and she asked, "[W]hat can I do to convince you. Come by my office."

I credit Then's testimony which was not specifically rebutted by Mary Ann Unanue. I find that the above statement by Unanue coupled with the invitation to come to her office so she could "convince" him made in the presence of the other employees was the solicitation of grievances with the implied promise that they would be remedied. Moreover, in the absence of any evidence of such solicitation in the past, it is clear that the solicitation of grievances with the implied promise to remedy them, was undertaken to convince employees that Respondent would resolve their grievances without the need for union representation. I find Respondent violated Section 8(a)(1) of the Act thereby. *Matheson Fast Freight*, 297 NLRB 63, 69 (1989).

Salesman Boris Vega testified that at weekly meetings held with the salespersons between October 18 and November 18, 1998, Mary Ann Unanue regularly told the employees that if they chose union representation, they would lose all their benefits and that bargaining would begin at zero with no benefits. Salesman Juan Carlos Gonzalez testified that at the five meetings he attended between October 18 and November 18, 1998, Mary Ann Unanue told the employees that if they selected union representation, they would not get anything. He testified that Unanue stated, "[E]ven if the Union won, employees could still lose because they could lose all their benefits." He testified that she did not tell the employees that Respondent has an obligation to bargain in good faith if the Union won the election.

Gonzalez's and Vega's testimony in this regard were supported by similar testimony of witnesses called by Respondent in this case. Carlos Galvis testified that Mary Ann Unanue told the employees at these meetings that if the employees chose union representation, "bargaining would start from the ground and they would work up or work down." Sergio Tamargo testified that Mary Ann Unanue told the salespeople that "negotiations would start at zero" and benefits could go up or down from there. I find that Mary Ann Unanue's statements to the salespersons as testified to by salesmen Vega and Gonzalez whose testimony I credit, were violative of Section 8(a)(1) of the Act as they were clear threats to reduce employee benefits if the employees chose union representation. The impact of Unanue's statements were that the employees would lose existing benefits at the outset and that the Union would have to successfully bargain with Respondent to obtain their restoration. See *Capital EMI Music*, 311 NLRB 997, 1008 (1993), and *Shaw's Supermarkets*, 289 NLRB 844 fn. 3 (1988).

Salesman Boris Vega testified that at the sales meetings in the October 18 to November 18, 1998 period, Mary Ann Unanue told the salesman that she had been considering offering them a 401(k) plan but as a result of the union campaign "everything was suspended." Mary Ann Unanue testified that Respondent had under consideration a 401(k) plan since early 1998, for all its employees but that would be negotiable if the Union won the election.

I credit Vega's unrebutted testimony and find that Mary Ann Unanue's comments to its employees were violative of Section 8(a)(1) of the Act. It is clear that her remarks were intended to and had the effect of indicating to the employees that they had lost (at least temporarily) a benefit by reason of their support of the Union. Respondent presented no evidence to support the statement by Unanue that the 401(k) plan had been compromised because of the union campaign. The clear implication of Unanue's remarks to the employees was that Respondent was unable to follow through with the 401(k) plan under consideration. However, Respondent presented no evidence to support this statement by Unanue. See *Laidlaw Waste Systems*, 307 NLRB 52, 54 (1992).

Salesman Vega also testified that at the meetings Mary Ann Unanue told the sales employees that Respondent could use distributors to distribute its products and that with or without its sales staff, the Company would go on and the salespersons would no longer be required. Vladimir Fouchard, a witness called by Respondent, testified that Mary Ann Unanue told the sales employees at these meetings

that she could use independent contractors or brokers rather than the sales personnel as Respondent was in a right-to-work State.

I credit the unrebutted testimony of Vega and Fouchard as Mary Ann Unanue did not directly address this in her testimony. I find as contended by the General Counsel that this was a "veiled threat to eliminate the salesmen's jobs if they selected the Union as their collective bargaining representative . . . ." I find this statement was violative of Section 8(a)(1) of the Act. *Bestway Trucking*, 310 NLRB 651, 671 (1993). It clearly sent the message to its salespersons that Respondent could arbitrarily eliminate their jobs.

Salesman Juan Carlos Gonzalez testified that at a meeting between October 21 and November 18, 1998, being held by Mary Ann Unanue, he stood up and stated that he supported the Union. When told to sit down and keep quiet by a sales supervisor, he refused. He testified that Unanue then asked, "If you are not in agreement with the Company, why don't you just leave." Unanue testified that she remarked that if she were not happy with a company she would just leave.

I credit Gonzalez' version. However, I find that under either version, the comment by Unanue was violative of Section 8(a)(1) of the Act as Unanue's comment as clearly a threat of discharge in retaliation for the comments of Gonzalez in support of the Union. See *McDaniel Ford, Inc.*, 322 NLRB 956 (1997); *Paper Mart*, 319 NLRB 9 (1995).

Warehouse employee Francisco Cabrera testified that in late September or early October 1998, at a meeting of the night-shift warehouse employees Mary Ann Unanue spoke to the employees following the showing of a video, Cabrera asked her why the night-shift employees were required to perform the loading work for the Tampa Distribution Center. He contended the morning shift could do this work. Unanue told him at the meeting that this work would no longer be assigned to the night shift. Unanue testified that she told the employees at the meeting she would try to have this work transferred to the day shift and did so.

The General Counsel contends in brief that this "promise to remove a disagreeable assignment was intended, and would have tended, to discourage employees from supporting the Union, coming as it did within a week to two weeks prior to the representation election." I find that the promise was violative of Section 8(a)(1) of the Act. I recognize that the promise to eliminate this task considered disagreeable, from the night shift, was in answer to an unsolicited inquiry by an employee and conceivably may not have been viewed as favorable by the day shift who were also scheduled to vote in the upcoming elections. However, I find that this promise of the removal of the task considered disagreeable in response to Cabrera's inquiry was violative of Section 8(a)(1) of the Act, as it came within a short period prior to the election and would tend to discourage employee support of the Union. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

Boris Vega, Juan Carlos Gonzalez, and Reinaldo Bravo testified that on February 24, 1999, they and other employees wore union caps and stickers to a sales meeting and were all ordered by supervisors to remove them or leave the meeting. Gonzalez and Vega testified that there had never been a dress code or prohibition against the wearing of union paraphernalia prior to this meeting.

I credit the testimony of these employees and find that the prohibition against the wearing of union paraphernalia was violative of Section 8(a)(1) of the Act. *Sears, Roebuck & Co.*, 305 NLRB 193, 198–199 (1991); *Kendall Co.*, 267 NLRB 963, 965 (1983).

Truckdriver Roldolfo Chavez testified that on August 8 or 9, 1999, Frank Unanue (president of Goya Foods of Puerto Rico who is one of only three shareholders of Respondent) during a conversation with Chavez and warehouseman Gilberto Torres, told Chavez that a cap with a union logo then being worn by Chavez was an "affront" to him and that he was going to do everything possible to force a divorce between the Union and Respondent's employees. Frank Unanue also told him that he was the Union in Respondent's facility in Puerto Rico, that he liked to work with people on a one to one basis and that Respondent did not need any third parties in its business. Frank Unanue testified he did not say anything like "he did not like the hat Chavez was wearing and he was going to divorce the Union and Goya." At one point in his testimony Frank Unanue in reference to the conversation stated, "I don't give a damn if he wears a union hat!" At another point in his testimony, he called salesman, Reinaldo Bravo, a fool for talking to employees of one of Goya's customers about the Union which he (Frank Unanue) considered disloyal to the customer.

I credit the testimony of Chavez as set out above. I find that Frank Unanue's antiunion sentiments permeated his testimony. It is clear that he considers the Union as an interloper in Respondent's relationship with its employees and considers those who support the Union as disloyal to Respondent. I find that Frank Unanue's statements to Chavez and Torres were violative of Section 8(a)(1) of the Act as they were coercively threatening to employees who asserted their Section 7 rights to support the Union and implicitly threatened that the Respondent would not negotiate with the Union and that it was futile to support the Union because he would do everything possible to "divorce" the Union and Respondent's employees.

Pedro Gonzalez testified that in early November 1999, Frank Unanue told the employees at a sales meeting of all salespersons that if Goya employees continued with the union rallies and activities at the Winn-Dixie supermarkets, Respondent could lose the account and "employees could suffer because they would lose their jobs." Juan Carlos Gonzalez testified that at a sales meeting in September 1999, Frank Unanue told the employees that if they kept "fooling around by protesting at Winn-Dixie Supermarkets, that Winn-Dixie was going to remove Goya salesmen from their stores and Goya was going to have to terminate a lot of salespeople . . . and not specifically, just the salesmen who serviced the Winn-Dixie stores." This was in reference to a large union rally which had been held near a Winn-Dixie store in June 1999, and during which the Union International Leadership had led a group of union members and three Goya employees in an excursion into the Winn-Dixie store. The three Goya employees were discharged by Respondent

for their participation therein. It also referred to an incident in a Winn-Dixie store where Goya salesman Reinaldo Bravo had claimed to have discovered a nest of rodents in a box of Mojo sauce while he was stocking the Winn-Dixie shelves with Goya products and had called this to the attention of the Winn-Dixie store's management. As a result of this incident Bravo was banned from this store by Winn-Dixie which was one of four large stores serviced by Bravo and which was not replaced by a reassignment of another account by Respondent thus resulting in the underemployment of Bravo and the consequent loss of income by Bravo.

I find that the statement made by Frank Unanue at the November 1999 meeting was a coercive threat of discharge and/or underemployment as in the case of Bravo if the employees continued in their support of the Union and that Respondent thereby violated Section 8(a)(1) of the Act. I find in agreement with the General Counsel's argument in brief that the statement by Frank Unanue was violative of the Act notwithstanding whether or not Winn-Dixie had been contemplating removing the Goya salesmen from its stores as there was no direct evidence that Winn-Dixie was contemplating the elimination of direct store delivery or the reason why it was contemplating doing so.

In a letter dated July 9, 1999, sent to its salesman Respondent contended that the incident involving the finding of rodents in a box of Goya products at a Winn-Dixie store on July 2, 1999, by Reinaldo Bravo had placed the salespersons' jobs in jeopardy, I find this letter was violative of Section 8(a)(1) as a threat of loss of employment or underemployment to the salespersons if they continued in their support of the Union in the absence of any direct supporting evidence of this.

C. The Discharge of Turienzo, Galvez, and Martin

On June 30, 1999, the Union held a rally on a public parking lot across the street from Winn-Dixie Store 235 located in Miami, Florida. The purpose of the rally was to publicize and garner support for its health based grievances against Goya for alleged rodent infestation and unsanitary and unsafe working conditions. The Union had made arrangements for the rally and obtained permits from the city of Miami and also provided for Miami police security as required by the city of Miami. The Union was holding its convention at Miami Beach and several bus loads of union officials and representatives were bused to the rally where they were joined by a number of the warehouse and sriver unit employees of Goya. A large inflatable rat was placed at the site and a large grandstand which accommodated a number of speakers including Goya employee Alberto Turienzo who was a member of the union bargaining committee and a leading union supporter. The rally was loud and boisterous with various speakers leading chants concerning the Union's campaign against unsafe and unsanitary working conditions at Goya. On June 23, 1999, employees Turienzo, Martin, and Rolando Aquiar had previously registered complaints with the Florida Department of Agriculture (DOA) which found rodent activity. The DOA found rodent infestation in Goya's bean and rice areas and this section was temporarily shut down. Additionally, Goya's largest customer, Winn-Dixie representatives found evidence of rodent infestation upon its inspection of the warehouse.

At one point shortly before 4 p.m. Union President Jay Mazur, Secretary/Treasurer Bruce Raynor, and Executive Vice Presidents Edgar Romney and Ed Clark led a group of union officials including the Union's chief negotiator, International Representative Mark Pitts, to solicit support from Winn-Dixie. Pitts invited Goya employees Turienzo, Galvez, and Martin to accompany the group of approximately 10 or more individuals. Additionally several individuals with video cameras followed the group as it entered the Winn-Dixie Store. There have been several versions by witnesses as to the manner in which the group entered the store. Winn-Dixie Security Manager James Brogan testified the group "stormed" the store. Johnathan Goldberg who was the "crises" management consultant for Goya and who was present at the store at the time of the rally testified that the group entered the store in a purposeful walk. My review of the videotapes entered in evidence convinces me that a purposeful walk is the more accurate description. Once inside the store some members of the group walked through the cash register lanes to enter the transverse aisle between the cash registers and the grocery shelves while customers were in the lanes. Commencing shortly after their entry into the store, Union Secretary/Treasurer Raynor loudly demanded to see the manager repeating several times, "I want to see the manager." The group was met by store security guards and Miami police who told them they must leave. The shouting lasted less than a minute. Union Secretary/Treasurer Raynor then talked in a normal voice and told the police and security guards he wanted to give a letter to the manager. Upon his realization after a brief discussion that the police were insisting the group leave the store, Raynor signaled the group to go and they left the store with some prodding from the guards and police. They then went to an area in the front of the store where Raynor continued to ask to see the manager and present him with a letter asking Winn-Dixie's support in the Union's dispute with Goya. Upon being advised that the manager was not coming out, Raynor left the letter on the sidewalk by the guards and the group returned to the rally on the street.

The letter reads as follows:

> THE WORKERS OF GOYA FOODS AND UNITE HEREBY DEMAND THE FOLLOWING OF THE WINN-DIXIE SUPERMARKET CHAIN:
>
> 1. Commit your store to an ongoing role in the Goya workers' campaign to end unhealthy and unsafe practices at their workplace.
> 2. Establish a hot line where workers can anonymously inform a senior management official of new or continuing health and safety problems at Goya.
> 3. Demand a non-retaliation pledge from Goya for all workers who provide information on unhealthy and unsafe practices at Goya.

The group had been inside the store approximately 4 minutes. There was no physical confrontation. No arrests were made. Goya's public relations/crises management consult-

ant, Johnathan Goldberg, carried a camera and took photos of the group. Upon reviewing them, Mary Ann Unanue determined that Turienzo, Galvez, and Martin wearing their blue Goya shirts were among the group. Goya discharged all three employees on July 7, 1999, the same day it suspended Bravo. Turienzo was a 13-year employee at the time of his discharge. Martin was an 11-year employee and Galvez was a 19-year employer at the time of their discharges. My review of the videotapes discloses that none of the three engaged in any overt action of any kind other than being in the group. Turienzo was immediately behind the two group's leaders Raynor and Romney. Galvez and Martin were at the rear of the group. All three employees testified that they did not speak. The videotapes appear to refute this but it is not clear whether they spoke only among themselves or what they said.

The Respondent contends the actions of Turienzo, Galvez, and Martin were unprotected as they were seeking a boycott of Goya Foods and their participation in the entry into the Winn-Dixie store constituted misconduct which was sufficient to render their activities unprotected. Respondent argues in the alternative that even if the participation of Galvez and Martin in the group action is found protected, Turienzo's conduct should be held unprotected as he was a more active participant than the other two employees.

Analysis

I find the actions of employees Turienzo, Galvez, and Martin in joining the group which entered the Winn-Dixie store were protected concerted activities under Section 7 of the Act. I find no evidence that they were seeking a boycott of Goya products as contended by Respondent. I find that the entry into the store by the group was a nonviolent solicitation of Winn-Dixie's support in dealing with the dispute with Goya. The mission of the group as led by Raynor was to deliver a letter to the Winn-Dixie manager. Notwithstanding the loud shouting by the union leaders which lasted less than a minute, there is no evidence that the three discriminatees engaged in any misconduct of any kind, much less misconduct so egregious as to cause their loss of the protection of the Act. It is undisputed that Mary Ann Unanue did not conduct any interviews with Turienzo, Galvez, or Martin prior to Goya's discharge of them. Rather the Respondent seized on the photographs taken by Jonathan Goldberg and relied on his representation that the entry of the group was improper. However, Goldberg did not specifically attribute any improper conduct to any of the three Goya employees in the group. Moreover, the disruption to the neutral employer was of short duration inside the store (less than 4 minutes) and did not appreciably interfere with the activities of the store as customers continued to shop in the store aisles and cash registers continued to ring as they were checked out as shown in the videotapes. The demonstration by the Union inside the store was peaceful with no violence and had only a minimal adverse impact on operations as customers and employees looked up and then continued to carry out their business. See *NLRB v. National Furniture Mfg. Co.*, 315 F.2d 280, 284–286 (7th Cir. 1963); *Chrysler Corp.*, 228 NLRB 486, 490 (1977); *Service Employees Local 525 (General Maintenance Service)*, 329 NLRB 638 (1999); *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229 (1980).

I agree with the General Counsel's argument that the instant case is distinguishable from "*Restaurant Horikawa"*, 260 NLRB 197 (1982), and *Burger King Corp.*, 265 NLRB 1507 (1982), where disruptive and arguably violent demonstrations were held unprotected. These cases involved restaurants where patrons have a normal expectation of quiet enjoyment as opposed to a busy supermarket involved here, and the videotapes show that no violence was committed against any customer or employee of the Winn-Dixie store. See also *Saddle West Restaurant*, 269 NLRB 1027, 1042–1043 (1984), where the Board adopted the administrative law judge's finding that the lack of customer complaints or complaints by the restaurant, supported a finding that the discriminatee had acted in a flagrantly disruptive manner so as to lose the protection of the Act.

I, thus, conclude that the three employees, Turienzo, Galvez, and Martin were engaged in protected activity in their participation in the Union's demonstration in the Winn-Dixie store, that Respondent had knowledge of their participation in the protected activity, that Respondent had animus against the Union and its supporters as demonstrated by its conduct and other violations found in this decision. I find that Respondent's animus toward the Union and its supporters was a motivating factor in its decision to discharge them in retaliation for their engagement in the protected union activity and that the General Counsel has established a prima facie case of violations of Section 8(a)(3) and (1) of the Act committed by the discharge of these employees by Respondent. I find Respondent has failed to rebut the prima facie case by the preponderance of the evidence. *Wright Line*, 251 NLRB 1083 (1980).

D. The Suspension and Underemployment of Sales Representative Reinaldo Bravo

On July 2, 1999, 2 days after the Union's actions at the Winn-Dixie Store 235, an incident occurred at Winn-Dixie Store 366 also in Miami.

Sales Representative Reinaldo Bravo testified as follows: He is a 10-year employee. In July 1999, he was assigned four stores which he was responsible for serving. This involves stocking the shelves allotted to Goya in four stores. In addition to Winn-Dixie Store 366, he was assigned two La Mia stores and a Sedano store. Salesmen are paid solely on commission. At that time he earned a total of approximately $900 biweekly in commissions from the four stores. On the morning of July 2, 1999, he was preparing to stock the shelves of the Winn-Dixie store with food products from Goya which had been delivered to the store by a Goya driver. Drivers deliver the food products to stores and salespersons stock the shelves and merchandise the products. He brought a cardboard case of Mojo sauce to the aisle in the store where it was to be stocked. Mojo sauce is a vinegar based barbecue sauce. Upon opening the box he discovered a rodent's nest on the top of the bottles with three baby rodents in it. He is uncertain whether they were mice or rats. He called over a Winn-Dixie employee named Enrique Trigo, who was

nearby to look at this discovery. He then closed the box and took it back to the stock area and removed the bottles from the box and cleaned them and placed them into an empty wooden milk carton box and brought them back into the store and stocked them on the shelves. He asked Store Manager Carlos Ortega for a camera and was furnished one. He then took a picture of the rodents. The store manager told him to get rid of the rodents and he then put them down a storm drain. The store manager then came to the stock area and asked where the rodents were and upon being shown by Bravo, the store manager took a photograph of one of the rodents which was floating on the top of the storm drain. The store manager asked him where the Mojo sauce was. Bravo told him he had stacked them on the shelves in the store. The store manager told him to remove them immediately. He did so and upon his return to the stock area, he found that the manager and employee Trigo were opening all the boxes of Goya product and inspecting them. He assisted them with this. No additional rodents were discovered. He was told not to stock any of the Goya products and to leave everything as it was.

He left the store and called Local Union President Monica Russo who was unavailable. Bravo was an active union adherent. He subsequently called Russo again and spoke with her. He wanted her advice as to what he should do. She directed him to bring the photograph to her. On his way to her office he was paged by Goya's Miami general counsel, Carlos Ortiz, who directed him to return immediately to Goya and bring the photograph with him. He said he would be in later and denied having the photograph. Upon arrival at Russo's office he asked her for advice as he was concerned that Goya might blame him for the incident. She directed him to return to Goya with two union representatives, Johan Pena and Eduardo Gonzalez, for representation and to also take with him, fellow salesman, Diosmin Meira as a witness in case Goya would not permit him to have union representation. Meira had accompanied him to the union office. He returned to Goya and was met by three Federal Food and Drug Administration (FDA) agents who interviewed him but did not permit him to have a representative present. Although he heard President Mary Ann Unanue in the next room to the meeting room at Goya in which he was interviewed, neither she nor Carlos Ortiz, who had told him to return to Goya, spoke to him. After his interview he returned to the Winn-Dixie store and discovered that all of the Goya products had been picked up for return to Goya. He exchanged greetings with the manager and left. He returned the next morning to the Winn-Dixie store and was told by the manager that Goya should have informed him that he was not to return to the Winn-Dixie store.

Former President Mary Ann Unanue testified that on July 3, 1999, Winn-Dixie's grocery merchandiser, Paul Picard, notified her that Winn-Dixie would not accept any deliveries from Goya until further notice and that all Goya salesmen must stay out of South Florida' stores. Goya notified its salesmen of this. Bravo was notified by his supervisor of this. Prior to this Picard had on June 30, 1999, stopped delivery of all perishable items from the Goya facility following the finding of rodent infestation at the Goya facility. On July 5, 1999, Bravo received an e-mail message from Goya vice president of sales, Jose-Maria Perez, informing him of the ban of Goya salesmen from Winn-Dixie stores. On July 6, 1999, Bravo was told by Perez that he could no longer service Winn-Dixie. Perez gave him a memorandum indicating it was Winn-Dixie's decision. Perez suggested he not return to work the next day. On July 7, 1999, Perez telephoned Bravo and told him he was suspended. Bravo asked Perez the reason for his suspension and Perez stated he did not know the reason. Bravo remained suspended until July 12, 1999, when he was permitted to return to work. Bravo was never informed of the reason for his suspension. Upon his return to work on July 12, he learned that Winn-Dixie Store 366 had been removed from his route and he was reduced to servicing three stores. Since salesmen are compensated solely on commission the loss of the Winn-Dixie store significantly reduced his compensation from $900 biweekly to $400 to $500 biweekly. Prior to the hearing in this case Respondent had never asked Bravo anything about the Winn-Dixie incident. Nor was he asked for a statement. It appears from the record that Goya made no investigation into the incident but relied solely on alleged reports received from Paul Picard who had allegedly received them from the store manager.

On July 6, 1999, then President Mary Ann Unanue and Vice President of Sales Jose-Maria Perez met with Picard in a 4-hour meeting and persuaded Picard to permit the Goya salesmen to resume the servicing of the Winn-Dixie stores except for Bravo who was no longer permitted to service Winn-Dixie Store 366. Perez was not called to testify. Picard, though under subpoena, did not appear at the hearing. Mary Ann Unanue was the only other participant in this meeting. Her testimony sheds little light on the reason why Bravo was barred from servicing Winn-Dixie Store 366. When asked why Winn-Dixie had barred Bravo from Store 366, she testified, "That they just did not want him back." She also did not directly respond to an inquiry by counsel for the General Counsel as to whether there was any discussion of the reasons Picard was barring Bravo from the store during the 4-hour meeting. She testified, "About Mr. Bravo, he (Picard) mentioned that he did not want him back in that store and no other Winn-Dixie store." This record does not support a finding as to the reason Picard ordered that Bravo be barred from the Winn-Dixie store. Previously, Winn-Dixie had inspected Goya's bean and rice area and found evidence of rodent activity and had ceased delivery of these products for a brief period.

Part Owner Frank Unanue, the uncle of Mary Ann Unanue, spent considerable time at the Miami Goya warehouse after the advent of the union campaign in 1998, whereas he normally is in Puerto Rico where he is president of the Goya operation there. He testified that he had "heard" from undisclosed persons or sources that Bravo had been barred from the Winn-Dixie store because he had left Goya product on the aisle, thus, creating a hazardous condition and had walked off the job. Mary Ann Unanue testified Goya refused to assign Bravo to another store to replace the Winn-Dixie store because she suspected him of tampering with the box of Mojo sauce because of Picard's report of Bravo having found rodents in a box. Frank Unanue testified initially that Bravo

had not been reassigned another store because he was suspected of having tampered with the box of Mojo sauce. Winn-Dixie's chief of security, James Brogan, testified that Bravo had been removed from the store because he had left boxes in the aisle creating a hazardous condition, placed the bottles of Mojo sauce on the shelves and left the store. Brogan's testimony was not based on his personal observation. Bravo denied having left the aisles in the condition above described by Frank Unanue and Brogan and stated he had left the store after being told by the manager not to stock the shelves. On October 14, 1999, the Respondent's attorney, James Crosland, filed a position statement with the Region in this case. As of that date the Respondent had not yet received copies of the investigative report and accompanying statements of employees in the Winn-Dixie store as well as that of Bravo. As noted above, Mary Ann Unanue's testimony did not shed any light on the reasons (if any were given) for Picard's barring of Bravo from the Winn-Dixie store or its failure to reassign stores to him. However, without any investigation having been undertaken by the Respondent, its attorney, Crosland, asserted in the position statement that its decision to suspend Bravo "was a direct result of (Paul) Picard implicating Bravo in possible tampering and/or misconduct." However, at the time of the October 14, 1999 position statement, Respondent was not in possession of the Food and Drug Administrative (FDA), Office of Criminal Investigation, Report of Investigation of August 20, 1999, and the accompanying statements of witnesses. The report found that the results of laboratory analysis were consistent with rodent activity. The investigation failed to uncover any evidence of tampering. In a statement taken by FDA agents of Enrique J. Trigo, a Winn-Dixie employee of Store 366, Trigo stated that on July 2, 1999, while he was walking to the back of the store near the receiving area he saw Bravo with an opened box. Trigo saw the contents of the box and observed "2 small mice pinkish in color." He did not observe any "nesting material in the box, however he did notice that the cardboard dividers within the box appeared to have been bitten, as well as a hole on the top right hand corner of the box." In a statement taken of Goya president, Mary Ann Unanue, by the FDA agents on July 6, 1999, she stated that on July 5, 1999, she received a telephone call from Nicholas P. Alvarez Camp, Goya's director of sales, who told her that Warehouse Manager Sergio Bazain had found two cases of Mojo one of which contained a mouse inside. She immediately called the warehouse and spoke to Bazain who told her he had been called over by Francisco Caberra, a high-low operator, to two cases of Kirby Mojo Sauce which contained holes in the top corner of each case with one of the holes in the boxes larger than the other holes and which appeared to have been chewed by a mouse. Bazain told her that while examining the case with the chewed hole, a mouse came out and Caberra commented to him words to the effect of, "you see, I show you what's going on and you guys claim that the union is doing this." Additionally, former supervisor, Jose Valdez, who is retired from Goya, testified that there were rodent problems at the Goya facility after Mary Ann Unanue reduced the level of pest control services. Mary Ann Unanue was not questioned concerning this and his testimony is thus unrebutted.

The record supports a finding that there was evidence of rodent activity at the Goya facility as supported by the testimony of retired employee Valdez and current employees Antonio Sanchez and Sergio Tamargo and as supported by the findings of rodent activity by DOA and by Winn-Dixie representatives. The Union seized on this health and safety issue and chose to publicize it as part of its overall bargaining strategy on behalf of the employees. The use of the large inflatable rat and the demonstration of July 2, 1999, were in furtherance of the Union's adoption of this issue. Goya's response to this issue was to deny that there was any rodent problem and Mary Ann Unanue issued press releases attributing the rodent problems to others. There is little doubt from a review of the testimony of Mary Ann and Frank Unanue that they contended that there were no rodent problems at the Goya facility except that which they attributed to the Union and its supporters. With respect to Bravo it is evident that he was acting in support of the Union's contention that there were rodent problems at the Goya facility as well as his concern for his own position, when he took the photograph of the rodents to the union offices, rather than to the Goya facility as demanded by Goya General Counsel Ortiz. Mary Ann Unanue testified that she believed Bravo was acting for "the solidarity of the group."

Subsequently, Bravo who had depended for his livelihood on the four stores he serviced for which he received commissions, lost two more stores, thus, being reduced to one store to service. These two stores he lost were La Mia stores which he lost purportedly for poor performance. Bravo testified he was overheard discussing the Union with a La Mia employee by a La Mia supervisor. After the Union filed a charge with the Board against La Mia, it relented and wrote a letter solicited by the Union stating that La Mia had "no objection" to Bravo's return to service the two stores provided he "gave 100%." President Bob Unanue who had replaced Mary Ann Unanue in August 1999, testified at the hearing that the stores were not returned to Bravo because the employee who had been assigned the stores following Bravo's removal was doing a good job. Mary Ann Unaune and Bob Unanue both testified that Respondent's practice was not to assign new stores to salespersons who were banned by the stores.

The General Counsel and the Charging Party contend that the Respondent violated Section 8(a)(3) and (1) of the Act by suspension of Bravo and its failure to assign him new stores to replace the three stores he had lost, thus, drastically reducing his income. Frank Unanue, a part owner of Goya, and a member of the Respondent's board of directors who made frequent visits to Goya in Miami testified he believes that Bravo put the rodents in the box in order to discredit Goya.

Analysis

I find the General Counsel has established a prima facie case of a violation of the Act by reason of Respondent's suspension and subsequent underemployment of Bravo, by its failure and refusal to assign him another comparable store to replace the Winn-Dixie store he lost and by its failure and refusal to reassign Bravo to the La Mia stores upon receipt of

the letter by La Mia. Respondent contends that it does not reassign salesmen who are barred from one store to another store as a replacement. However, a review of the testimony of former President Mary Ann Unanue and current president, Bob Unanue, shows that there is no written rule in this regard and that there has been no absolute set practice in this regard and that some salesmen who were barred from a store were assigned another store as a replacement. Bravo testified without contradiction that he was assisted by Goya management in a prior instance with the Winn-Dixie store involving a former store manager.

In this case it is clear that Bravo was an active union supporter who brought the rodent incident to the attention of the Union and that the Respondent had knowledge of this and that Respondent had animus against the Union as demonstrated by the numerous violations found in this case. A review of the investigative reports of the Food and Drug Administration which obtained statements from all witnesses to the incident at Winn-Dixie discloses that there was no finding of any tampering with the box of Mojo sauce by Bravo. Indeed at least one witness in a statement (Enrique Trigo) taken by the FDA Agents stated that he saw holes in the cardboard box which appeared to have been chewed by rodents. There was also other ample evidence in this record such as the testimony of several witnesses called by Respondent that there had been rodent problems at Goya. I find that Respondent's suspicions that Bravo may have tampered with the box of Mojo sauce and have planted the rodents in the box were insufficient to establish a reasonable belief that Bravo had in fact tampered with the box of Mojo sauce. I have considered the evidence that Bravo brought this to the attention of the Union and did not immediately report to Goya but delayed until he could obtain union representation and appeared at Goya later that afternoon where he voluntarily subjected him to questioning by the FDA.

This testimony was not rebutted by Respondent's witnesses. I find that Respondent's animus toward the Union and its supporters has been clearly established in this record including Respondent's numerous violations of the Act. Bravo was a known union supporter who was involved in protected concerted activities in bringing the finding of rodents in Goya's product casing to the attention of the Winn-Dixie management and to the attention of the Union. I find that Respondent's knowledge of Bravo's protected concerted activities in furtherance of the health and safety issues raised by the Union on behalf of the Goya employees and the public was a motivating factor in its decision to suspend him and to underemploy him by failing to reassign him to a comparable store account to replace the Winn-Dixie's account he lost and by failing to reassign the LaMia stores to him upon receipt of the letter signed by La Mia. I find that the General Counsel has established a prima facie violation of the Act by its suspension and underemployment of Bravo. I find the Respondent has failed to rebut the prima facie case by the preponderance of the evidence. Its mere suspicion of Bravo is insufficient to establish any reasonable basis or belief that he tampered with the product by the introduction of rodents. *Wright Line*, supra, *Roure Bertrand*, 271 NLRB 443 (1984).

E. The 8(a)(5) and (1) Allegations

1. The denial of union representation

In early November of 1998, Warehouse Manager Bazain approached forklift operator Alberto Turienzo, a leading union supporter, and informed him that Respondent had received a letter designating two employees as union delegates to represent employees. This was shortly after the Union's certification in October 1998. Bazain told Turienzo that Respondent would not recognize the delegates until there was a signed contract and that it was possible there never would be a contract. This testimony by Turienzo was unrebutted as Bazain was not called to testify.

Additionally on November 2, 1998, Respondent's attorney, James Crosland, sent a letter to union organizer Johan Pena stating that Respondent would not recognize the authority of "employee representatives" to conduct any business with it or its supervisors. The letter also stated that Respondent would only authorize Pena or the union president to bring issues to Respondent's attention and that this must be done only through him (Crosland). The letter further stated that if "employee representatives abandoned their work to represent employees they would be subject to discipline." At the hearing, former President Mary Ann Unanue affirmed that this letter accurately stated Respondent's position on the issue.

On November 3, 1998, Reinaldo Mendoza requested union representation for a warning issued to him and this request was denied by Personnel Manager Banos who informed him that Respondent did not recognize the authority of union delegates. In the warning notice issued to Mendoza, Bazain stated, "The Company does not recognize the authority of any Goya employees to act as a delegate of the Union."

On October 29, 1999, either Auturo Jimenez or Jesus Martin, the designated employee representatives, were rebuffed when Respondent refused to permit them to become involved in a personnel matter. On December 13, 1998, Respondent's attorney, Crosland, told the Union's negotiator at a collective-bargaining meeting that the Respondent would not recognize union shop stewards or stewards according to the unrebutted testimony of negotiator Rodolfo Chavez.

Analysis

I credit the foregoing testimony of the General Counsel's witnesses, as supported by the letter and written warning. I find Respondent's intransigent position in rejecting the Union's designation of delegates, stewards, or representatives was violative of Section 8(a)(5) and (1) of the Act. It essentially ignored the certification of the Union as the collective-bargaining representative of its employees. The obvious effect of Respondent's rejection of union representatives was to place the Union in a catch-22 situation. The Union could not designate union representatives to represent its employees until they obtained a contract permitting it to do so. Until that happened which could be "*never*" according to Warehouse Manager Bazain, the employees were effectively denied union representation. Further, Crosland in his letter to the Union set out to dictate to the Union who their representatives could be and directed that they could only raise issues

with him. The net effect of this denial of union representation was to reverse the outcome of the election by ignoring the Union. As will be set out infra in this decision the Union followed through with this rejection of the Union by its failure to notify the Union of and bargain with it on mandatory subjects of bargaining. It ignored the Union and instituted unilateral changes in complete disregard of the Union's status as the certified collective-bargaining representative of the unit employees.

The right of employees to designate representatives of their own choosing is a fundamental right under Section 7 of the Act. It is an internal union matter and is a nonmandatory subject of bargaining. See *Howland Hook Marine Terminal Corp.*, 263 NLRB 453, 454 (1982); *Native Textiles*, 246 NLRB 228, 229 (1979); *Missouri Portland Cement Co.*, 284 NLRB 432, 434 fn. 13 (1987); *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976).

2. The unilateral changes

Warehouseman Reinaldo Mendoza testified to an incident on November 2, 1998, when he received a call from his wife who was in medical distress. He asked Warehouse Manager Bazain for permission to leave which was denied initially by Bazain who confirmed the denial by calling the office. Bazain then told Mendoza he could not leave because of new company regulations.

Mendoza left and on November 3 or 4, 1998, he was called to a meeting with Bazain and Maria Cristina Banos and issued a written warning which he refused to sign until a union delegate arrived. Banos told him Goya would not recognize any delegates. This position is also set out in the warning letter. Mendoza testified that prior to the election he had been granted permission to leave for emergencies. Additionally, retired Warehouse Supervisor Jose Valdez testified that after the election he was informed by Bazain and subsequently Mary Ann Unanue that supervisors could no longer grant employees permission to leave during work hours, even for emergencies.

Union representative Pitt testified that the Union had demanded to be notified of any changes in wages, hours, or terms and conditions of employment and afforded the opportunity to bargain concerning them and had set this out in written communication to the Respondent.

Analysis

I credit the unrebutted testimony of Mendoza, Valdez, and Pitt as supported by the written documentation. I find that Respondent violated Section 8(a)(5) and (1) of the Act by the promulgation and implementation of the new rule by refusing to notify the Union and bargain with the Union prior to its implementation. It also violated Section 8(a)(3) and (1) of the Act by the refusal to permit Mendoza to leave the facility for his wife's emergency and by the issuance of the written warning to him. *Boland Marine & Mfg. Co.,* 225 NLRB 824, 831 (1976).

3. The unilateral distribution of routes

The undisputed evidence establishes that since on or about November 1, 1998, Respondent has unilaterally and without affording notice to and without bargaining with the Union redistributed the routes of drivers who were terminated or went on leave. The unrebutted testimony of employee Miguel Then who was also a union bargaining committee member, established that the routes of Domingo Villar, Carlos Gonzalez, Mario Robinson, Rolando Aguiar, and Llamil Yema were all distributed to other employees or in one case to a temporary agency employee without any notification to the Union.

Respondent's witnesses, former President Mary Ann Unanue and current President Bob Unanue both conceded that Respondent assigned routes without notifying or bargaining with the Union. Respondent contends it had the unfettered right to assign routes without regard to the existence of the Union based on past practice and inherent management rights. In Respondent's attorney, Crosland's, letter of November 2, 1996, he states, "As you know (or should know), it is the Company's prerogative to determine routes . . . ." "[S]hould the Union make any proposals regarding routes, the Company will consider them . . . unless and until that occurs, there is nothing to discuss at this time." Mary Ann Unanue testified, that she had "never asked permission to assign routes before and it wasn't in her to talk to anybody about how to assign a route to a salesman or a truck driver. It just never happened." Bob Unanue testified that in December 1999, when Tomas Hernandez retired he did not notify the Union of this and that it had not even crossed his mind to do so.

Analysis

It is clear from the record as in the case of the other unilateral changes that the Union was ignored and Respondent continued to operate its business as if the employees were not represented by the Union.

Allocation of work is a mandatory subject of bargaining. *University of Pittsburgh Medical Center*, 325 NLRB 443 (1998); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1022–1023 (1994), enfd. as modified 87 F.3d 1363, 1368–1371 (D.C. Cir. 1996). Respondent has a duty to notify and bargain to impasse with the Union prior to implementing a change. *NLRB v. Katz*, 369 U.S. 736 (1962) Respondent's reliance on past practice is misplaced as there was clearly no automatic or routine practice with objective criteria used in the assignment of routes. Rather Respondent exercised unlimited discretion in assigning routes. I find that Respondent violated Section 8(a)(5) and (1) of the Act by its failure to notify and bargain with the Union concerning the assignment of routes which was a mandatory subject of bargaining. *Eugene Iovine, Inc.,* 328 NLRB 294 (1999). There was no evidence presented to establish that the assignment of routes was such an extraordinary event posing a major effect on the Respondent and requiring immediate action such as to excuse it from its bargaining obligation. *RBE Electronics of S. D.*, 320 NLRB 80 (1995); *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995).

4. The unilateral assignment of newly acquired business or reassignment of old business to the sales representatives

The record reflects and I find that after the certification of the Union as the collective-bargaining representative of the unit of salesmen and merchandisers, the Respondent completely failed to notify and bargain with the Union concerning the assignment of newly acquired business or the reassignment of old business to its sales representatives. The

assignment of stores to the salesmen vitally impacted their earnings which were based totally on commission. As was noted in the unrebutted testimony of Bravo, supra, his loss of the single Winn-Dixie store which was only one of four stores which he serviced, resulted in a reduction in his annual earnings of 44 to 55 percent. According to the unrebutted testimony of Juan Carlos Gonzalez as supported by the documentary evidence, Respondent added at least 10 to 50 new stores to its customer base. Gonzalez specifically testified concerning a new Winn-Dixie in the Duval area of Miami a BJ store 509, a Publix 715, a Sedano 26, a Wal-Mart in Naranja, close to Key West, a President supermarket in Broward, a Wal-Mart in Pembrooke Pines, a Winn-Dixie on 36th Street and 137th Avenue (in Miami), a Winn-Dixie on 12th Avenue and 12th Street (in Miami), a Publix on 97th Avenue N.W. and 41st Street (in Miami). Bravo testified that in November 1999, President Bob Unanue announced at a sales meeting that Goya had acquired two new Wal-Mart accounts, one in Florida City and the other in Hialeah.

In his letter of June 9, 1999, to Union Representative Mark Pitt, Respondent's attorney, Crosland, stated, "Historically, all aspects of the selection, assignment and reassignment of routes have been within the sole discretion of Goya customer service needs and requirements. Assessment of salesmen, routes and territories, and location of stores are the primary considerations in making such assignments. There are no written criteria. The Company of course is willing to discuss the Union's concerns regarding the assignment and reassignment of routes. However you should understand that the Company considers that these rights are and should remain management prerogatives." Former President Mary Ann Unanue testified she had to run her business, and had never asked permission to assign routes.

I find that Respondent violated Section 8(a)(5) and (1) of the Act by its refusal to notify and bargain with the Union about the assignment of routes to salesmen just as in the case of the assignment of routes to drivers discussed above. As the General Counsel contends, the assignment of routes to salesmen would be even less of an economic exigency because of the greater lead time of notice of the Respondent of store openings and acquisition of new accounts.

5. The unilateral increase in the number of temporary employees employed as drivers and the diversion of bargaining unit work to them

The unequivocal evidence clearly demonstrates that since about December 7, 1998, following the certification of the Union, Respondent increased the number of temporary employees employed as drivers and diverted bargaining unit work to them. Whereas only 16 drivers were hired between December 27, 1997, and December 7, 1998, 27 drivers were hired between December 8, 1998, and December 3, 1999. Then testified that prior to the certification of the Union in November 1998, the Respondent used only three temporary drivers on a regular basis but it has since November 1998 employed six to eight temporary drivers on a regular basis. Union Representative Mark Pitt testified that on three or four occasions he directly requested of Respondent's attorney, James Crosland, that the Union be notified about any and all changes that would impact the wages, hours, and working conditions of unit employees. He also reduced this demand to writing in a letter dated December 21, 1998. Pitt testified that Crosland told him the Company required temporary employees to run the business and "that is what they were going to do." Pitt also testified that throughout bargaining, Crosland contended that it had the right to make these unilateral changes on the ground that it was permitted to do so because it was merely status quo, past practice, or historical management rights.

Analysis

I credit the unrebutted testimony of Then and Pitt as set out above. It is clear that Respondent routinely bypassed the Union and instituted unilateral changes at will. It is undisputed that it did so without regard to its obligations to bargain. Respondent's basic position appears to be that it can continue to operate as if the Union did not exist on the basis of asserted past practice. While it could lawfully have continued to maintain the status quo by continuing to assign the same work to temporary employees, it could not lawfully unilaterally remove additional bargaining unit work from the unit by disproportionately increasing the number of temporary employees and assigning additional bargaining unit work to these temporary employees, *University of Pittsburgh Medical Center*, supra. An employer must notify and offer to bargain with a union about removal of bargaining unit work prior to assigning it to nonunit positions. *Hampton House*, 317 NLRB 1005 (1995).

It is clear that Goya's unilateral hire of additional temporary workers after the election deprived bargaining unit employees of bargaining unit work which had a significant impact on the bargaining unit employees.

I find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally and disproportionately increasing the number of temporary employees hired as drivers and diverting bargaining unit work without notifying the Union and affording the Union an opportunity to bargain.

6. The unilateral discontinuation of the policy of permitting employees to take home their company provided radiophones

Respondent had a policy of permitting certain employees to take company provided cellular phones home with them and to connect the phones to their personal cellular phone accounts. Following a strike on January 28, 1999, it instructed these employees to leave these phones at the facility after the end of the day thus eliminating a substantial benefit which had been used by some of the employees. Employee Rodolfo Chavez testified that as a result of Respondent's elimination of this benefit he purchased a comparable phone for $160 and that his new rate was $30 more per month. Mary Ann Unanue testified that the purpose for the cellular phones was to enable Goya to communicate with certain of its employees while they were on the road during the workday. Following the strike she decided to discontinue the personal use of the phones because she concluded that the Company could lose the ability to communicate with its employees who went on strike and retained the phone.

Analysis

I find Respondent violated Section 8(a)(5) and (1) of the Act by the unilateral discontinuance of the personal cellular phone privilege. Although arguably, Mary Ann Unanue may have had good reason for instituting the change, this did not excuse Respondent from its statutory obligation to provide notice to the Union and an opportunity to bargain prior to unilaterally making a change in the employees' terms and conditions of employment *Boland Marine & Mfg. Co.,* supra. This benefit was substantial and was a mandatory subject of bargaining. *Doefer Engineering*, 315 NLRB 1137 (1994).

7. The disaffection petitions and Respondents withdrawals of recognition

The Union was certified as the collective-bargaining representative of employees in the warehouse and drivers unit on October 26, 1998, and of employees in the sales and merchandisers unit on December 26, 1998. During the course of a year support for the Union which had once been strong, waned as a result of the Union's apparent inability to protect the employees in the two units from the onslaught of the multiple violations of Section 8(a)(1), the 8(a)(3) and (1) discharges of Turienzo, Galvez, and Martin, and the suspension and underemployment of Bravo, and 8(a)(5) and (1) violations by Respondent's refusal to permit the employees representation by freely chosen union representatives and the continuing implementation of unilateral changes in the unit employees' terms and conditions of employment without notice to the Union and opportunity for bargaining prior to the implementation of the changes and the lack of a labor agreement. The Union and the Respondent met only a total of 12 times in almost a year, 8 times for the warehouse and drivers unit and 4 times for the salesmen and merchandisers unit. Organizer Pena and Union Representative Pitt testified that they protested the limited scheduling of meetings by a month or more apart.

On December 7, 1999, Respondent's attorney, Crosland, sent a letter to Pitt stating:

> Dear Mr. Pitt:
>
> Our client Goya Foods of Florida, has a good faith doubt that your union continues to enjoy a majority representative status as to the Company's sales representatives. Our client, therefore, no longer has an obligation to bargain with your union. Accordingly, please be advised that we are canceling the bargaining session scheduled for December 17, 1999.
>
> Very Truly Yours,
>
> /s/ James Crosland

On December 20, 1999, Crosland sent a similar letter to Pitt withdrawing recognition from the Union with respect to the warehouse and drivers unit.

These withdrawals of recognition were based on a disaffection petition received by Respondent on December 7, 1999, for the sales unit and a disaffection petition received by Respondent on December 15, 1999, for the warehouse and drivers unit.

As of December 15, 1999, 44 of 62 employees in the sales unit had signed the petition. As of December 5, 1999, 26 of 38 employees in the warehouse and drivers unit had signed the petition.

On or about January 23, 2000, a petition in support of the Union was signed by 23 of the 38 employees in the warehouse and drivers unit. A few days later, this petition in support of the Union was delivered to Warehouse Operations Manager Sergio Bazain.

Analysis

I find that the Respondent's withdrawals of recognition from the Union in both units were violative of Section 8(a)(5) and (1) of the Act as the disaffection petitions were the direct result of the lengthy course of unfair labor practices engaged in by Respondent which resulted in a corresponding loss of support for the Union which was deemed ineffectual to protect the employees and improve their terms and conditions of employment. I also find that the withdrawal of recognition from the Union for the sales unit was a violation of Section 8(a)(5) and (1) of the Act as this withdrawal occurred prior to the expiration of the certification year.

As the record shows the Respondent withdrew recognition from the Union as to sales and merchandisers' unit employees on December 7, 1999. The Union had been certified as the collective-bargaining representative of the employees in the sales and merchandisers' unit on December 4, 1998. The Respondent withdrew recognition from the Union as to the warehouse and drivers unit employees on December 20, 1999, which was after the certification year as the Union was certified with respect to this unit on October 26, 1998. The "Board has long held that a certified union's majority status ordinarily cannot be challenged for a period of one year." *Chelsea Industries*, 331 NLRB 1648 (2000), citing *Centr-O-Cast & Engineering*, 100 NLRB 1507, 1508 (1952); *Ray Brooks v. NLRB*, 348 U.S. 96 (1954). In the recent case of *Chelsea Industries*, supra, the Board held that an employer does not have "the right, after expiration of the certification year, to withdraw recognition from a union on the basis of an antiunion petition circulated and presented to the employer during the certification year." I conclude that the Respondent's withdrawal of recognition from the Union for the sales unit was unlawful as the petition was circulated during the certification year. I conclude that the Respondent's withdrawal from the warehouse unit occurred after the expiration of the certification year.

Several employees testified they were discouraged by the terminations of Turienzo, Galvez, and Martin. Bravo's loss of client stores was also a matter of concern. Clearly, the withdrawals of recognition did not occur "in a context free of unfair labor practices of the sort, likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996); *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998); *Tocco, Inc.*, 326 NLRB 1279 (1998); *Pirelli Cable Corp.*, 323 NLRB 1009, 1010 (1997); *Vicent Industrial Plastics*, 328 NLRB 300 (1999); *Catalina Pacific Concrete Co.*,

330 NLRB 144 (1999); *Scott Brs. Dairy*, 332 NLRB 1542 (2000).

I also find that the decertification petitions were tainted by the Respondent's involvement in their circulation. *Exxel-Atmos, Inc.*, 323 NLRB 884 (1997). In the case of the warehouse unit there was direct evidence through the unrebutted testimony of former temporary employees supervisor, Daniel Acuna. He testified that in November or December 1999, Warehouse Manager Sergio Bazain directed him to retrieve a letter on his desk and give it to a warehouse employee. He identified the letter as the warehouse disaffection petition. He took the letter to warehouse employee, Marcel Viera, who signed it. He then returned the letter to Bazain's office and gave it to Goya President Bob Unanue. He heard Bob Unanue talking on the phone with Bazain and stating that another employee needed to sign it. He then volunteered and took the letter to the other employee (referred to as the "old man") for his signature.

With respect to the circulation of the disaffection petition among the salesmen, the evidence showed that in August 1999, a group of salesmen approached management with an interest in how to get rid of the Union. In a subsequent meeting with Frank, Bob Unanue, and Crosland, Bob Unanue told the employees they could draft a petition for signature of the sales employees. Crosland told them that if they got enough signatures, they could take it to the NLRB to start the process. Salesman Carlos Galvez who was on the disaffection committee used office copy machines and circulated the petition on work time. I thus find that the evidence establishes that Respondent's management was involved in the promotion and assistance of the salesman's circulation of the disaffection petition *Beverly California Corp.*, 326 NLRB 232 (1998).

In view of the foregoing findings of the unlawful withdrawal of recognition, I find it unnecessary to decide whether the past disaffection petition show of support in the warehouse and drivers unit was sufficient to deprive the Respondent of the privilege of withdrawing recognition from the Union. I find Respondent violated Section 8(a)(5) and (1) of the Act by its withdrawal of recognition from the Union with respect to both employee units.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in unlawful interrogation, solicitation of grievances with the promise to remedy them, and issuance of unlawful threats to employees as found above.

4. Respondent violated Section 8(a)(3) and (1) of the Act by its suspension and underemployment of its employee Reinaldo Bravo.

5. Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of its employees Alberto Turienzo, Humberto Galvaz, and Jesus Martin.

6. Respondent violated Section 8(a)(3) and (1) of the Act by the issuance of a written warning to Renaldo Mendoza.

7. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to permit union designated representatives to represent its employees in the appropriate units and by its implementation of several unilateral changes in the terms and conditions of employment of the employees in the appropriate units without notifying the Union of the changes and affording the Union an opportunity to bargain concerning these changes.

8. The Respondent unlawfully withdrew recognition from the Union with respect to both units.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondent offer immediate reinstatement to Alberto Turienzo, Humberto Galvez, and Jesus Martin to their former positions or to substantially equivalent ones if their former positions no longer exist, and restore to Reinaldo Bravo the level of customer accounts he serviced prior to July 2, 1999. The above employees (Turienzo, Galvez, Martin, and Bravo) shall be made whole for all loss of backpay and benefits sustained by them as a result of Respondent's unlawful discharge of Turienzo, Galvez, and Martin and its failure to reinstate them and by its suspension of Bravo and failure to restore to Bravo the level of customer accounts he serviced prior to July 2, 1999. Respondent shall also remove the written warning from the files of Reinaldo Mendoza.

Respondent shall be ordered to make the unit employees in both certified units whole for any loss of wages or benefits they may have suffered as a result of Respondent's unlawful unilateral actions. Respondent shall also be ordered to recognize, and upon request, within 10 days of the request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the two certified collective bargaining units and if an understanding is reached, embody it in a signed agreement. *Raven Government Services*, 331 NLRB 651 (2000). Respondent shall also be ordered upon the Union's request to rescind any unilaterally implemented changes it made in the terms and conditions of employment of unit employees since November 3, 1999, provided that Respondent shall not be required to cancel any favorable changes the Union wishes to leave in place. Respondent shall also be ordered to, upon the Union's request, meet and adjust grievances with the Union's designated representatives for collective bargaining or grievance adjustment purposes, including its employee representatives.

All backpay and benefits shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for

the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[Recommended Order omitted from publication.]